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ABSTRACT

The literature review addresses the assessment, placement, treatment, and employment rights of the handicapped in relation to their implications for teachers, administrators, and university personnel. Assessment is considered in terms of eligibility criteria/definitions of handicapping conditions, responsibility for assessment, fair and appropriate assessment, and independent evaluations. A section on placement reviews past and present litigation concerning appropriate educational placement of exceptional children, looks at litigation specific to the least restrictive environment concept, and discusses the provision of educational services in light of recent judicial decisions. Another section focuses on the right to treatment, the right to an education, specific details regarding treatment, behaviorism, and legal procedures to be followed before the utilization of behavioral techniques (such as aversive treatment, punishment, shock, drug therapy, restraint, and timeout). A final section looks at employment with attention to past legislation, litigation related to discrimination, and occupational qualifications. Among the pieces of legislation cited are P.L. 94-142 (the Education for All Handicapped Children Act) and the Rehabilitation Act of 1973, Section 504. (SB)

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A LEGAL PERSPECTIVE OF SPECIAL EDUCATION:

A REVIEW

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A LEGAL PERSPECTIVE OF SPECIAL EDUCATION: A REVIEW

In 1919, a judge allowed the exclusion of a cerebral palsied child from the public schools because of the child's "depressing and nauseating effect on the teachers and school children and . . . (because) he required an undue portion of the teacher's time" (*Beattie v. Board of Education of City of Antigo*, 1919). In 1927, in the case of *Buck v. Bell*, the Supreme Court of the United States supported a sterilization policy for retarded citizens stating, "It is better for all the world . . . (if) society can prevent those who are manifestly unfit from continuing their kind" (p. 207). Fifty years later, however, legislation (e.g., P.L. 93-113, 1973; P.L. 94-142, 1975) and litigation (e.g., *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania*, 1971; *Mills v. Board of Education*, 1972) expressing diametrically opposing opinions have become commonplace. How this legal development actually transpired and the current legal implications for teachers, administrators and university personnel constitutes the focus of this review.

Public programs in the United States for the mentally and physically handicapped are not really new; attempts at rehabilitation can be traced to the middle 19th century. For example, the work of such pioneers as Samuel G. Howe and Louis Braille (with the blind) and Thomas H. Gallaudet (with the deaf) is well known to students of special education. However, most early programs were housed primarily in state-operated residential institutions patterned after the asylums of Europe. These institutions were far removed from populous areas, and handicapped individuals were often shunted off to them with no hope of ever returning to their families. The prevailing public opinion toward the handicapped was one of discrimination and hopelessness. It was believed the handicapped children could never be taught; therefore, to spare everyone from the problems related to them, they were sent far from home and removed from the public view.

Little by little though, this attitude of repression began to erode, and the development of teacher training programs, special classes and day schools were seen in the early 20th century. At best, these early programs demonstrated a low level of tolerance for the handicapped. Certainly, not all handicapped children had an education provided for them. Since special education requires such an individualized effort, school systems in the early 20th century were simply "not prepared physically, philosophically, or financially to operate far reaching programs for exceptional children" (Reynolds & Birch, 1977, p. 17). Although some of the first federal involvement in special education began in 1931 with the establishment of the Section on Exceptional Children and Youth in the United States Office of Education, it was not until the period immediately following World War II that any significant advances were noted.

The economic climate in the United States during this post-war period was exceptional. Despite economic recessions in 1953-54 and 1957-58, the country had never done better. The average income per family rose, and the stock market did well. Dewhurst (1955) predicted that the trend in America would be to continue to have more goods per person than ever before. This rosy economic picture was a far cry from the depression of the 1930's and the scarcity of the war years, and it set the stage for an unprecedented growth in special education programs. Treatment for the handicapped became economically possible.

Another factor which contributed significantly to the growth of special education programs in this time period was the country's desire to "repair its war wounded and also those children who had mental and physical disorders" (Melcher, 1976, p. 128). As became readily evident, provisions for the seriously impaired World War II and Korean War veterans had to be made. Facilities in veterans hospitals were expanded, and new funds were allocated for research into handicapping conditions. The knowledge gained from research, as well as the financial commitment exhibited by the public,

spilled over into the educational realm, and growth was observed. In the 1950's, the federal government began to take its first, tentative steps into the provision of educational opportunities for the handicapped. In 1954, P.L. 83-531 authorized cooperative research in education and provided grants for this research to colleges and universities. In 1953, Public Laws 85-905 and 85-926 were passed. The former provided funds to develop captioned films for the deaf, while the latter provided grants to states and colleges to train professionals who would, in turn, train teachers of the mentally retarded. Special education was moving from the dungeon and into the limelight, and it became politically popular to champion the rights of the handicapped. This public attitude along with continued economic prosperity in the 1960's resulted in a remarkable influx of federal dollars for special education.

The most influential politician of the times was, of course, the then President of the United States, John F. Kennedy. His commitment to education for the handicapped is epitomized in a formal statement of his given on October 11, 1961 in which he stated, "The manner in which our nation cares for its citizens and conserves its manpower resources is more than an index to its concern for the less fortunate. It is a key to its future. Both wisdom and humanity dictate a deep interest in the physically handicapped, the mentally ill, and the mentally retarded. Yet, although we have made considerable progress in the treatment of physical handicaps, although we have attacked on a broad front the problems of mental illness, although we have made great strides in the battle against disease, we as a nation have too long postponed an intensive search for solutions to the problems of the mentally retarded. That failure should be corrected." To correct that failure, and to correct other failures involving other handicapping conditions, Congress responded with a myriad of legislation during the 1960's. 1961 saw the passage of PL 87-276 in which funds were appropriated to assist in the training of the teachers of the deaf. Public Law 88-164, passed in 1963, provided grants for training, research and demonstration projects in the areas of mental retardation and mental illness. 1965 saw four enactments related directly to special education: (a) PL 89-36, (b) PL 89-105, (c) PL 89-258, and (d) PL 89-313. These acts provided for a national technical institute for the deaf, government built facilities for research and demonstration projects, more captioned films, and aid to the states to provide education for children in state operated institutions. 1965 also saw the passage of The Elementary and Secondary Education Act (ESEA) (PL 89-10, 1965). Although this act was not directly designed for the handicapped, a number of titles (e.g., Title I, Title IX) provided special sources of funding primarily for programs for children of low-income families.

1966 was also a banner year for special education legislation. Public Law 89-511 provided funds for the improvement of libraries in residential facilities and for materials and facility improvements for the handicapped in public libraries. Public Law 89-522 extended the services of the Library of Congress to include materials for physically handicapped individuals and Public Law 89-694 established a model high school for the deaf at Galludet College. Public Law 89-752 expanded the Higher Education Act by requiring the elimination of architectural barriers when federal funds were used to construct new buildings at colleges and universities. This act also forgave National Defense Education loans at the rate of 15% per year for each year the recipient taught handicapped children. Most importantly, in 1966, was the addition of Title VI to the Elementary and Secondary Education Act (PL 89-750, 1966). This piece of legislation provided funds to states for programs for the handicapped, established a National Advisory Committee on Handicapped Children and founded the Bureau for the Education of the Handicapped (BEH) within the Department of Health, Education, and Welfare.

The Mental Retardation Amendments of 1967 (PL 90-170) extended the program of matching grants for the construction of university affiliated and community mental retardation facilities. The ESEA Amendments of 1967 (PL 90-247) greatly expanded services to the handicapped by (a) establishing regional resource centers, (b) establishing regional deaf/blind centers, (c) expanding the research authority of BEH, (d) amending Title I to provide support for handicapped children in state operated schools, (e) amending Title III to earmark 15% federal funds for programs for the handicapped, and (f) amending Title VI to include grants to federal schools, including the Bureau of Indian Affairs. In 1968, a bill requiring the elimination of architectural barriers in all building constructed with federal funds (PL 90-480) was passed, as was a bill which provided for research in pre-school education (PL 90-538). Public Law 90-538 also marked the first time Congress dealt with all handicapping conditions in a single bill. Also passed this year was an act which required that 10% of

the funds received by states for vocational education be used on behalf of the handicapped (PL 90-576).

In 1969, Public Law 91-61 established a national center on educational media and materials for the handicapped. Also in 1969, the ESEA Amendments (PL 92-230) consolidated all existing laws for the handicapped into the Education of the Handicapped Act and extended and enlarged a number of programs. The Developmental Disabilities Act of 1970 (PL 91-517) and its companion legislation, The Developmentally Disabled Assistance and Bill of Rights Act (PL 94-103, 1975) have provided states with federal funds to enable them to provide services for developmentally disabled children and adults. These services are to be directed toward the alleviation of the developmental disability and to the social, personal, physical or economical development of the individual.

Public Law 93-380, passed in 1973, was a forerunner of Public Law 94-142, and provided a mandate for the education of the handicapped. The two most famous pieces of legislation affecting the handicapped are Public Law 93-112, the Vocational Rehabilitation Act of 1973, and Public Law 94-142, The Education for All Handicapped Children Act of 1975. In Section 504 of the former act, discrimination against the handicapped is prohibited in any program that receives federal funds. The latter was designed "... to assure that all handicapped children have available to them, within the time periods specified, a free, appropriate public education which emphasized special education and related services designed to meet their unique needs" (PL 94-142).

In addition to the legislation which has been passed, legal mandates have also arisen from the rulings of the judicial system. In the past, the federal courts had been reluctant to interfere with the educational system. This reluctance was expressed by the Supreme Court in the case of *Epperson v. Arkansas* (1968) in which the justices stated, "Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint ... Courts do not and cannot intervene in resolution of conflicts which arise in the daily operation of school systems which do not directly and sharply implicate basic constitutional values." However, Nordine (1977) contends that the courts have been forced to intervene by the reluctance of school administrators to enforce the basic legal rights of all students. She also discusses four separate areas in which she feels the courts have held a major interest: (a) desegregation, (b) academic freedom, (c) religious establishment and exercise, and (d) civil rights. Of these four, the concept of civil rights has had the major influence in litigation affecting the handicapped.

There are actually five amendments to the Constitution that have been cited in support of the civil rights for the handicapped. The First Amendment gives one the right of freedom of speech, assembly, religion, press and petition; the Fourth Amendment protects against unreasonable search and seizure; and the Eighth Amendment protects against civil and unusual punishment. Although these amendments have been utilized in cases involving the handicapped, the most oft cited amendments are the Fifth and the Fourteenth. The Fifth Amendment is famous for its clause on self-incrimination, but it also contains a powerful clause stating that no person shall be deprived of life, liberty, or property without due process of law. The Fourteenth Amendment also contains a due process clause, an equal protection clause, and an extension of the governmental restrictions of the Bill of Rights to the state governments. Prior to the passage of the Fourteenth Amendment, the guarantees of the Bill of Rights did not apply to state government. These amendments in particular have forced institutions to deal fairly with the handicapped. This fairness with which the handicapped must be dealt will be explored in the four major sections of this paper. The assessment, placement, treatment and employment rights of the handicapped as they now exist will be discussed as to their implications for teacher, administrators and university personnel.

Assessment

The first stem in the provision of services for the handicapped is to identify the population. On the surface, this task may appear to be quite simply, however, in reality, the accurate identification of handicapped children has proven to be a nemesis for school systems. The problems of identification

(e.g., cost, time, personnel) have contributed to inconsistent test administration by assessment personnel, and have led to assessments and placements which are administratively convenient, but not necessarily appropriate when viewed in terms of the needs of the child (Weatherly & Lipsky, 1977). For example, a school district may have a suspected learning disabled (LD) child referred for testing. However, because LD classrooms are filled to capacity, the district personnel may slant the testing in order to declare the child eligible for placement in a less crowded, educable mentally retarded classroom. Clearly, abuses such as this are blatantly illegal, and have led to an enactment of clearly written statutes and the rendering of consistent judicial interpretation.

Eligibility

Public Law 94-142 has provided a set of definitions identifying exactly what children are eligible for special education services. Local school districts and states may expand these criteria, but minimally, they must include:

> "(a) As used in this part, the term "handicapped children" means those children evaluated in accordance with sections 121z.530-534 as being mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, other health impaired, deaf-blind, multihandicapped, or as having special learning disabilities, who because of those impairments need special education and related services.
>
> (b) The terms used in this definition are defined as follows:
> (1) "Deaf" means a hearing impairment which is so severe that the child is impaired in processing linguistic information through hearing, with or without amplification, which adversely affects education.
> (2) "Deaf-blind" means concomitant hearing and visual impairments, the combination of which causes such severe communication and other developmental and educational problems that they cannot be accommodated in special education programs solely for deaf or blind children.
> (3) "Hard of hearing" means a hearing impairment, whether permanent or fluctuating, which adversely affects a child's educational performance but which is not included under the definition of "deaf" in this section.
> (4) "Mentally retarded" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period, which adversely affects a child's educational performance.
> (5) "Multihandicapped" means concomitant impairments (such as mentally retarded-blind, mentally retarded-orthopedically impaired, etc.), the combination of which causes such severe educational problems that they cannot be accommodated in special education programs solely for one of the impairments. The term does not include deaf-blind children.
> (6) "Orthopedically impaired" means a severe orthopedic impairment which adversely affects a child's educational performance. The term includes impairments caused by congenital anomaly (e.g., clubfoot, absence of some member, etc.), impairments caused by disease (e.g., cerebral palsy, amputations, and fractures or burns which cause contractures).
> (7) "Other health impaired" means limited strength, vitality or alertness, due to chronic or acute health problems such as heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, leukemia, or diabetes, which adversely affects a child's educational performance.
> (8) "Seriously emotionally disturbed" is defined as follows:
> (i) The term means a condition exhibiting one or more of the following characteristics over a period of time and to a marked degree, which adversely affects educational performance.

(a) An inability to learn which cannot be explained by intellectual, sensory, or health factors;
(b) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
(c) Inappropriate types of behavior or feelings under normal circumstances.
(d) A general pervasive mood of unhappiness or depression; or
(e) A tendency to develop physical symptoms or fears associated with personal or school problems.
(ii) The term includes children who are schizophrenic or autistic. The term does not include children who are socially maladjusted, unless it is determined that they are seriously emotionally disturbed.
(9) "Specific learning disability" means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations. The term includes such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. The term does not include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, of mental cultural, or economic disadvantage.
(10) "Speech impaired" means a communication disorder, such as stuttering, impaired articulation, a language impairment, or a voice impairment, which adversely affects a child's educational performance.
(11) "Visually handicapped" means a visual impairment which, even with correction, adversely affects a child's educational performance. The term includes both partially seeing and blind children" (PL 94-142, 1975, 121a. 1-10)

With these criteria as guidelines, school districts should be able to identify all handicapped children. Indeed, recent judicial decisions have mandated that it is the school district's legal and financial responsibility to actively search out and identify all handicapped children ages 3 to 21. This has not always been the state of affairs, as is discussed in the next section.

Responsibility for Assessment

Public Law 94-142 clearly states that school districts have an affirmative duty to locate and assess all children who meet the eligibility criteria. However, because of the expense and effort involved, some districts have attempted to shift the burden of this initial identification to the parents. For example, in the case of *Pierce v. Board of Education* (1976), the district did not provide an evaluation. However, the Illinois Appellate court found that school districts must identify and refer for services all eligible children. To neglect this duty could possibly make school board members liable for any permanent harm resulting from this neglect, and to require the parents to pay for this identification is illegal.

The case of *Frederick L. v. Thomas* (1976) involved learning disabled children who had been placed in a regular class rather than a special class designed to meet their educational needs. Although this case dealt primarily with placement, the court rejected the argument that assessment was the parents' responsibility since it would require the parents to "(a) recognize (that their) child is not functioning academically, (b) recognize that the cause of the child's underachievement may be something that requires special education instruction, (c) know that due process hearings are available, (d) believe that through a due process hearing (their) child—though not a severe behavior problem may receive special help, (e) properly carry out the procedures for initiating the hearing, which includes obtaining an expert psychiatric opinion." The court felt that this tremendous burden should not fall to the parents, but rather to the agency which provides the service, in this case, the school district.

Finally, in the case of *Mattie T. v. Holladay* (1977*), the court found that the state of Mississippi was not extending a vigorous enough effort to identify all of its handicapped children. In citing the Senate

Committee on Labor and Public Welfare, the court stated that the "failure to identify handicapped children represents a major barrier to fulfillment of state programs." Similarly, "(t)he committee is convinced that a more intense effort must be expended in the identification of handicapped children." The burden of this identification process was laid squarely on the shoulders of the local and state educational bodies. This was not always true as in the case of *Fleming v. Adams* (1967). In this case, an application for eligibility for special education was signed by a chiropractor rather than a licensed physician. This technicality resulted in a denial of services for the child. In this case, the court found that there was no violation of civil rights since an education is not a right guaranteed by the constitution. Since Colorado had a law requiring applicants for special education have their application signed by a licensed physician, the failure to do so could result in the rejection of the application. Now, however, if the school district wanted such an examination, it would be its duty to provide the examination at no cost to the parents.

A Fair Assessment

In addition to actually providing the assessment, the school districts must also insure that the assessment accurately and fairly diagnoses the individual child's abilities and deficits. Hence, all assessments must be individually developed. For many years, school districts relied solely on IQ testing to determine eligibility for placement in special classes. Although IQ tests have a definite place in assessment proceedings, they do have limitations. Neisworth (1969) has stated that ". . . conventional intelligence tests: (a) can provide fair predictions of school success, assuming we do nothing exceptional to help or hinder certain students and thus destroy the prediction. Prediction per se is of little use since we do not use intelligence tests to make selection decisions; (b) cannot explain performance on the test or intelligent behavior sampled by the test; (c) cannot reveal the capacity or potential of a student; (d) cannot assist educators in matching students with educational treatments" (p. 45).

Conventional IQ tests also inherently have features that would result in discrimination towards certain classes of people. A major discriminatory component is the language in which the test is given. It is not difficult to imagine what results would be obtained if a child who spoke only a foreign language was tested in English. These circumstances existed, however, in the case of *Diana v. State Board of Education* (1970*). In this case, the court ruled that the label of mental retardation, which had been assigned to the child on the basis of an IQ test, was the result of the discriminatory (language) features of the test, and a re-assessment was ordered.

IQ tests can also have inherent racial bias, which could result in an inordinate number of minority students being classified as handicapped. In the case of *Mattie T. v. Holladay* (1977*), the court stated that "(n)umerous education experts, psychologists and parents testified that the practice of classifying children as mentally retarded based primarily on scores on intelligence tests (IQ tests), not only is bad educational practice, but results in serious over-classification of blacks and other minority children." This statement reaffirmed the findings in *Larry P. v. Riles* (1972; 1977) in which the court held that a child was labeled mentally retarded because of the racial basis within the IQ test which was used.

In order to combat the inherent bias of testing and the inappropriate assessments provided by some school districts, PL 94-142 provides a clear set of guidelines to be followed when assessing a child for placement in a special program. They are:

> "Preplacement evaluation.
> Before any action is taken with respect to the initial placement of a handicapped child in a special education program, a full and individual evaluation of the child's educational needs must be conducted in accordance with the requirements of section 121a.532 (45 CFR 121a.531).
> Evaluation procedures.
> State and local educational agencies shall insure, at a minimum, that:
> (a) tests and other evaluation materials:
> (1) Are provided and administered in the child's native language or other mode of communication, unless it is clearly not feasible to do so;

(2) Have been validated for the specific purpose for which they are used; and
(3) Are administered by trained personnel in conformance with the instructions provided by their producer;
(b) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designated to provide a single general intelligence quotient;
(c) Tests are selected and administered so as best to ensure that when a test is administered to a child with impaired sensory, manual, or speaking skills, the test results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (except where those are the factors which the test purports to measure);
(d) No single procedure is used as the sole criterion for determination of an appropriate educational program for a child;
(e) The evaluation is made by a multidisciplinary team or group of persons, including at least one teacher or other specialist with knowledge in the area of suspected disability; and
(f) The child is assessed in all areas related to the suspected disability, including, where appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities (45 CFR 121a.532).
Comment: Children who have a speech impairment as their primary handicap may not need a complete battery of assessments (e.g., psychological, physical, or adaptive behavior). However, a qualified speech-language pathologist would (1) evaluate each speech impaired child using procedures that are appropriate for the diagnosis and appraisal of speech and language disorders, and (2) where necessary, make referrals for additional assessments needed to make an appropriate placement decision.
Placement procedures.
(a) In interpreting evaluation data and in making placement decisions, each public agency shall:
(1) Draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior;
(2) Insure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options" (45 CFR 121a.533).

From the above regulations, one can clearly see that all assessments must be multidisciplinary in nature and geared to each individual child. To do otherwise would be in violation of the law. Even children who exhibit exceptional characteristics as vague as "neurophysiological maturational lags" (*Matter of Kaye*, 1975)* must have an appropriate assessment given to them to determine their educational needs.

Independent Evaluations

Public Law 94-142 also explicitly states that parents have the right to obtain an independent evaluation if they are not satisfied with the school's evaluation. In placement decisions, then, the school district must consider the results of this independent evaluation in addition to their own evaluation.

Parents are to notify the school district when they intend to have an independent evaluation performed because of their dissatisfaction with the school's evaluation. "The school then might make any of four responses: (a) it might decide that what it is doing is appropriate and call for an impartial hearing to sustain that judgment; (b) it might order an outside evaluation of its own; (c) it might inform the parents where they could get such an evaluation at no cost; or (d) it might tell the parents the

criteria under which the independent evaluation must be obtained, including the location of the evaluation and the qualifications of the examiner, so that the parents' evaluation will be reimbursable:" (Martin, 1979, p. 42-43). As is clear from the above statement, there are many situations in which an independent evaluation may be obtained at no cost to the parents.

Implications

The implications for administrators concerning the assessment of handicapped children can be concisely summarized in the statement: Be certain that: (a) assessments are provided on all suspect children, (b) all assessments are geared precisely for each individual child. To fail to provide an assessment where one is needed or to provide an inappropriate assessment would result in a disservice to the child and could result in damaging lawsuits.

Special education teachers must learn to make use of the extensive evaluations that will result from these legal mandates. The assessment is only the first step of a child's educational career, yet it provides valuable information that must be utilized in developing a child's educational program. Secondly, teachers must become adept with informal educational assessments of a child's abilities. These informal assessments will play a major part in the total educational assessment program.

Finally, university personnel must be certain that the teachers and administrators they prepare are well versed in the legal mandates concerning assessment and the use and administration of formal and informal assessment tools. Also, research should be initiated exploring various culture-free tests. The development of a thorough, well-standardized, totally culture-free achievement test would be a major breakthrough and would provide invaluable assistance in the accurate assessment of handicapped children.

Placement

The decision about the specific educational placement of an exceptional child is to occur during a placement hearing at which the parents are present (PL 94-142). Although placement decisions do not always go smoothly, they should proceed in a prescribed manner. However, the systematic identification of exceptional children through proper assessment and the provision of educational services in the least restrictive environment have not always occurred and do not always occur smoothly. The purposes of this section are: (a) to review past and present litigation concerning the appropriate educational placement of exceptional children, (b) to review the litigation specific to the concept of provision of educational services in the least restrictive environment, and (c) to discuss the provision of educational services in the community setting in light of recent judicial decisions.

Placement

Many court cases have been heard concerning an exceptional child's right to be placed within the schools and the appropriateness of this placement within specific settings. In *Cuyahoga County Association for Retarded Children and Adults v. Essex* (1976), the court ruled that the state of Ohio had an obligation to use all available resources to provide educational services to all children who might profit from instruction. The court further ruled that each child's instruction was to be provided according to his/her mental capacity. The court stated that, although the right to receive an education is not guaranteed by the constitution, that it was guaranteed as a property right. Often, however, individual children with particular handicaps or behavioral problems associated with their exceptionality have been excluded from educational placement. For example, the *Matter of Warren A.* (1976*) is a case which involved an emotionally disturbed child who had been refused placement within a school district's special education facilities. The court ruled that an immediate hearing be

convened to determine the appropriate placement for the child. In *Hairston v. Drosick* (1976), the court heard a case where the school district refused to place a child with a normal IQ in a class with her peers because she was physically handicapped (spinal bifida) and incontinent. The court ruled that the school district's arguments were without merit and ordered the placement of the child in a regular class.

In other court cases, the results have been much the same. In the case of *In re Leopold Z.* (1974*), the court was concerned with an educable mentally retarded child who was a ward of the New York State Department of Mental Hygiene. The child had been identified as a juvenile delinquent and the Department of Mental Hygiene stated that it was not equipped to deal with the child's behavior problems, and had placed the child in an institutional setting. The court held that the child's incarceration must be ended and that he must be placed in a highly structured, residential facility. In the *Matter of Suzanne E.* (1976*), a child who was identified as multihandicapped spastic-quadriplegic with psycho-motor retardation and had had educational placement denied based on her handicap, the court ruled that such denial was illegal and ordered her appropriate placement. In New York, emotionally disturbed children were approved by the court as "handicapped" and their appropriate educational placement was ordered (*Matter of Patrick P.*, (1976*). This case was of special importance as New York had a very narrow definition of "handicapped" and this decision extended that definition (for a further discussion, see *The Cost of Education* elsewhere in this paper). In *Davis v. Wynne* (1977*), an educable mentally retarded child was suspended and then expelled from school due to his disruptive behavior. The court ruled his expulsion was a denial of proper placement. Currently, in *Stephen L. v. Indiana State Board of Special Education Appeals* (1978*), a child has filed suit claiming that an untrained psychologist improperly assessed him, and that his diagnosis and placement based on that inaccurate assessment (i.e., in a classroom for the mentally retarded) is in violation of PL 94-142, Section 504, and the equal protection and due process clauses of the Fourteenth Amendment. As can be seen from the above cases, although the courts continue to receive such cases, they have consistently upheld the right of the individual to a proper educational placement.

The educational placement of exceptional children in residential facilities has been seen as both appropriate and inappropriate by the courts. In the case of *In re Dennis M.* (1975*), the court held that the placement of a mentally retarded student in a "temporary" facility (institution) for four and one-half years was inappropriate. The court ordered that the student immediately be placed in an appropriate facility (e.g., one that met both his mental and social needs). In three other cases (*In re Batler*, 1975*; *In re Jetty*, 1974*; *Matter of Lofft*, (1976*), the courts held that local school districts who did not have adequate educational placements for exceptional children were responsible to locate (and pay for) or to develop such placements. In the case of *Matter of Lofft*, (1976*), the court held that to deprive a student of an education due to the lack of an appropriate local program was illegal. In fact, reimbursement was granted to a parent (*In re Downey*, 1973*) for the placement of his child in a Florida school when no appropriate placement was available in New York.

A common complaint surrounding placement is the alleged denial of appropriate treatment by providing the student with inappropriate placement. In a class action suit (*Fialkowski v. Shapp*, 1975), multiply-handicapped children charged they were denied appropriate educational placement as the available programs did not suit their educational needs. The court agreed with their position and ordered their appropriate placement. In two current class action suits (*Jawarski v. Pawtucket School Committee*, 1978*; *P-1 v. Shedd*, 1978*), the students argued they were either not appropriately identified, and therefore never placed, or that they were inappropriately identified, and therefore, placed incorrectly, or are still awaiting placement. In all cases, inappropriate placement or no placement leaves the individual in a placement more restrictive than necessary. However, the most forceful decision of the courts dealing with appropriate placement comes from *Haldeman v. Pennhurst* (1977) in which the court found that institutional placement for mentally retarded persons was inherently unconstitutional. Extrapolating from the available information, it would appear, based on the *Haldeman v. Pennhurst* decision (the case is currently being appealed), that institutional placement for any exceptional child may be seen as illegal. Institutional placement, however, should not be misread to include residential placement as being within the scope of the court's ruling. Residential placement, when it can be found in near normal environments (i.e., in community settings) is not forbidden by the *Pennhurst* ruling.

Least Restrictive Environment

The least restrictive environment (LRE) has been defined as occurring when "to the maximum extent appropriate, handicapped children, including children in public and private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling or the removal of handicapped children from the regular education environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aid and services cannot be achieved satisfactorily . . ." (PL 94-142, Section 612(5)(B)). In essence, Section 504 of the Vocational Rehabilitation Act (1973) includes identical requirements, and many state regulations carry similar requirements (e.g., Chapter 122, Article 14-8.02, The School Code of Illinois, 1979).[4]

This concept of least restrictive environment is often thought to be synonymous with mainstreaming. These two concepts grew from the same theoretical position (e.g., handicapped persons should be educated to the maximum extent possible with non-handicapped persons), however, perhaps due to present popularity of the concept, mainstreaming has been assumed to include placement of severely handicapped individuals with normal peers, regardless of academic skills or intellectual ability, and other essentially inaccurate concepts. Therefore, this paper will side-step mainstreaming as a theory or a practice and restrict itself to the concept of least restrictive environment. Turnbull (1978) has succinctly summarized the salient points of LRE. They are: (a) appropriate placement usually should occur in the school the child would normally attend; (b) appropriate (placement) is determined by the needs of the child and the content of his/her Individualized Educational Program; (c) inappropriate placement occurs when a child is placed in a classroom in which (due to his/her skills) he/she impairs the education of regular students; (d) placement in a private school or institution does not alter the child's right to placement in the LRE; and (e) proof of appropriate placement is the responsibility of the schools.

Even with the safeguards of Section 504 and PL 94-142, placements in educational settings that are more restrictive than necessary do occur. In *Dixon v. Weinberger* (1975), the court determined that institutional facilities are not the least restrictive environment and ordered that treatment be provided the plaintiffs in the LRE. In another institution-related case, the plaintiffs alleged that educational placement at an institution is inappropriate as the habilitation programs are inadequate, and have requested less restrictive educational alternatives than institutionalization (*New Jersey Association for Retarded Citizens v. New Jersey Department of Human Resources*, 1977*). *Egan v. School Administrative District 57* (1978*) is a current case which concerns complaint that a child's right to educational placement in the least restrictive environment was violated by placement in a segregated school[5] (e.g., one in which there are no non-handicapped peers.) Restrictiveness in educational placement, in fact, forms the basis of several pending court cases. In California (*California Association for Retarded Citizens v. Riles*, (1977*), a statewide suit alleges that some handicapped children are illegally segregated from their non-handicapped peers, and that other handicapped persons have been placed in classrooms with non-handicapped peers, but have not been provided with adequate support services. Both conditions are alleged to violate the individual's right to a least restrictive environment. LRE has also been used as an argument against the expulsion of exceptional children from the public schools. However, most cases involving expulsion revolve around due process arguments. In *Stuart v. Nappi* (1978), the plaintiffs have argued that expulsion from school contradicts PL 94-142's mandate that all placement decisions conform to the LRE concept. Placement within the least restrictive environment is, therefore, supported by both legislation and litigation.

An outgrowth to the placement and least restrictive environment issues is the issue of provision which revolves around the educational (and residential) services to the institutionalized handicapped in community versus segregated institutional settings. Also, as was noted earlier, the *Haldeman v. Pennhurst* (1977) decision included a ruling that institutional placements were inherently unconstitutional. This concept of community placement is repeated in *Bruster v. DuKakis* (1978*) and in *McEvoy v. Mitchell* (1979*), however, the *McEvoy* court ruled that the community placement of institutional residents would be unacceptable if community placement would be more restrictive than the institution. The community has at times, however, not readily accepted the placement of previously institutionalized individuals. In *Matter of Wagner* (1976*), the court ruled that local school districts may

be directed by the courts to enroll handicapped pupils. In a related case (*City of Evanston v. Ridgview House, Inc.*, 1976), a city sought to block the establishment of a group home which would allow for the community placement of mentally retarded individuals within its bounds. The court held that the establishment of a home to promote the community placement of these persons was permissable and that the city's action in attempting to block its construction was illegal.

In conclusion, the provision of appropriate educational services to handicapped persons in placements which are accepted as the least restrictive environment is strongly upheld as a right of handicapped children. Awareness of and adherence to this concept is an obligation of all individuals connected with the handicapped. The legal implications for the administrator (special or regular) are enormous. Good faith attempts to adhere to the regulations governing placement and LRE can greatly reduce one s chances of first-hand experience in judicial proceedings. The teacher trainer likewise has an obligation to transmit information about placement and the determination of the LRE. Regular educators are specially in need of this information to quell the groundswell of fears and misinformation associated with LRE and mainstreaming. Also, the researcher/evaluator is deeply involved with LRE. This profession will most likely determine, through replicated research, which placements are really appropriate to the child's ability to become a functioning individual and which are least restrictive of his learning style.

Treatment

The area of treatment for exceptional populations is probably the most legally complex of all areas. Treatment, as defined for the purposes of this paper, includes (a) the right to treatment and the right to an education, and (b) *any* specific interventions designed to enable the client to fulfill his/her maximum potential. This area is separated from assessment and placement in that it does not deal with where a client is placed or how this placement occurred. Rather, it deals with the interventions and techniques used with handicapped individuals once they have been properly assessed and placed. As has been noted earlier, and as is the case in this area, many judicial decisions have been based on the due process clause. Treatment for handicapped individuals, when inadequate or inappropriate, has been found to violate the due process clause of the Fourteenth Amendment, (e.g., *New York State Association for Retarded Children v. Rockefeller*, (1973). As will become evident, this judicial interpretation of the due process clause is consistent throughout many varied cases.

A recent decision has determined that residential institutions are inherently unconstitutional, and that placement should be made primarily in community-based facilities (*Haldeman v. Pennhurst*, 1977). This decision adequately summarizes a myriad of decisions involving the existence, maintenance and operation of residential institutions in which appropriate treatment for the residents was ordered (e.g., *Humphry v. Cady*, 1972; *Welsch v. Likins*, 1974; *Garrity v. Thomson*, 1978*; *Michigan Association for Retarded Citizens v. Smith*, 1978*). The role that court cases involving institutions have played in the development of a clearly defined right to treatment (and its counterpart, the right to an education) and a clearly delineated definition of treatment as it applies to handicapped individuals must be understood. Through many of these cases, the courts have defined treatment to include *any* conceivable intervention that will enable a client to achieve at his/her maximum potential. Similarly, the courts have mandated that handicapped clients have an inherent right to receive this treatment. Concurrently, court decisions dealing with educational systems have been totally consistent in finding that handicapped children have a right to an education and a right to receive, as a part of that education, any intervention that might possibly help that child to learn. This section discusses the (a) right to treatment; (b) the right to an education; (c) specific details regarding treatment; (d) behaviorism; and (e) legal procedures to be followed before the utilization of behavioral techniques. As stated earlier, this area is exceedingly complex, and a further division of the major areas into several subcomponents is necessary to provide clarity.

Right to Treatment

Historically, the handicapped have been shunted off to residential institutions where the major concern was simply to provide sheltered care for the individuals. Programs involving education, rehabilitation, and recreation did not exist (Melcher, 1976). All too often, when an individual was declared eligible for placement, this individual was sentenced to a life of hopelessness. Nothing would ever be done to help this individual achieve to his/her maximum potential. Recently, however, many changes have occurred, and the courts have mandated that all handicapped individuals have a *right to treatment*. To deprive individuals of this right is in direct violation of the due process clause as contained in the Fifth and Fourteenth Amendments. The due process clause reads in part "No person . . . (shall) be deprived of life, liberty or property, without due process of law." Legally, deprivation has been defined as any proceeding which changes a person's status (e.g., classification, as mentally retarded), and as such, this change in status cannot take place unless due process procedures are followed. Deprivation has also been defined to include the lack of "specific" treatments for the handicapped, and this section addresses the cases directly related to this topic.

The case of *Robinson v. California* (1962) was one of the earliest cases involving treatment of the handicapped. The justice's published opinion found that punishment for a status (in this case, involuntary drug addiction, but which could also include mental retardation) is inherently cruel and unusual. In effect, civil commitment without treatment would consist of punishment for a status, and would thus be in violation of the Fifth and Fourteenth Amendments. Similarly, the case of *Rouse v. Cameron* (1966) established that involuntary commitment can only occur when treatment is provided an individual, otherwise the commitment would be viewed as punishment.

One of the most famous cases involving the right to treatment was *Wyatt v. Stickeny* in 1971. This case involved a class action to guarantee the treatment of the mentally retarded residents of Alabama's state insitutions. The court dictated that the institutions must provide (a) a humane psychological and physical environment; (b) qualified and numerically sufficient staff; and (c) individualized treatment plans. Because of Alabama's lack of treatment for the residents, the court promulgated objective measurements and subjected them to judicial enforcement. The importance of this case can be illustrated by examining Shepards Citation Index (i.e., a legal index). As of January 1979, 174 cases have relied on *Wyatt* as a precedent.

Following *Wyatt*, similar decisions guaranteeing treatment for the handicapped were to become commonplace. The court, in the case of *New York State Association for Retarded Children v. Rockefeller* (1973), ordered the institution to correct deficiencies affecting physical safety and the risk of physical deterioration at an institution for the mentally retarded. The court also prohibited the seclusion of residents and ordered the immediate hiring of additional personnel necessary to accommodate the treatment plans for the residents. In the case of *Usen v. Sipprel* (1973*), the court found that an institution was in violation of the equal protection clause because services were not provided due to budgetary considerations. The case of *Welsch v. Likins* (1974) involved six mentally retarded residents of Minnesota's mental hospitals who filed a class action suit to obtain relief regarding treatment and conditions in the hospital and to consider alternatives to their placement. The court found that patients have a right to adequate care and that they must be given an opportunity to be cured. The court ruled that state officials must make good faith efforts to place patients in settings that are suitable and appropriate to their mental and physical conditions while least restrictive of their liberties. Similarly, the case of *Saville v. Troadway* (1974) found that the retarded, as a class, have the right to habilitative service.

The cases of *Donaldson v. O'Connor* (1974) and *O'Connor v. Donaldson* (1975) also addressed the handicapped's right to treatment. As before, the court found that the mentally ill have a right to adequate treatment. The defendants argued that their treatment consisted of "milieu therapy," however, the court viewed this as no therapy whatsoever, and awarded damages. Similarly, the cases of *New York State Association for Retarded Children v. Carey* (1975), *Michigan Association for Retarded Citizens v. Smith* (1978*), and *Garrity v. Thomson* (1978*) all supported the concept that handicapped individuals have a basic right to treatment, and that to not provide this treatment is in violation of various Constitutional guarantees. The right of the handicapped to receive adequate treatment is a right which has been firmly established in the annals of judicial decisions. A confinement of a handicapped individual without the provision of adequate treatment is now absolutely illegal. With

the widespread dissemination of this legal mandate, horror stories which so often permeated the history of the handicapped should no longer be as common.

Right to Education

A closely related topic to the right of the handicapped to treatment is their right to an education. Education is, in every sense of the word, treatment and would, therefore, logically fall within similar judicial review. Treatment has been previously defined as any specific intervention designed to enable the client to fulfill his/her maximum potential and, certainly, education would fall within this definition.

A case which has had a profound impact on the right of the handicapped to an education is one in which segregation was the issue rather than the exclusion of the handicapped. The finding of the Supreme Court in *Brown v. Board of Education of Topeka, Kansas* (1954), though, cuts through all prejudices and clearly establishes a precedent. In this case, the justices stated that "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. Today, it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." Clearly education must be provided to all children, however, it was not until 1971 that the precedent was directly applied to the handicapped.

The case of *Pennsylvania Association for Retarded Children* (P.A.R.C.) *v. Commonwealth of Pennsylvania* (1971) is perhaps the most famous of all special education cases. In this case, P.A.R.C. brought suit in federal court challenging Pennsylvania's practice of excluding mentally retarded children from its public school programs. The court found that the retarded *must* be given access to public school programs. Additionally, the court stated that tuition and maintenance costs in approved institutions and homebound instruction must be provided by the state in appropriate situations.

A month later, a similar case was filed in the federal courts in Washington, D.C. The case of *Mills v. Board of Education of Washington, D.C.* (1972) went beyond the P.A.R.C. case, however, and extended the right to education to include all handicapped individuals, not just the mentally retarded. Judge Waddy stated that to deny an education to handicapped individuals "while providing such education to other children, is a violation of the Due Process Clause." The precedent had been set for the mandatory inclusion of school-aged handicapped children within the public school systems of the states.

With the successful resolution of these two cases, litigation involving a handicapped person's right to an education began to abound. Results were consistent, and handicapped individuals began to see considerable progress. The courts found that handicapped children are guaranteed a free public education by the New York State Constitution (*Matter of Wagner*, 1976*; *Matter of Lolft*, 1976*), and that a student's right to a public education is a property right (*Goss v. Lopez*, 1975). Also at this time, President Gerald Ford signed The Education of All Handicapped Children Act of 1975, Public Law 94-142.

Even with these clear mandates, however, problems still continued, and numerous cases were brought before the courts under the guidelines of PL 94-142. In the case of *Harris v. Keane* (1976*), a class action was brought against the public schools of St. Croix, Virgin Islands challenging their exclusion of handicapped children. The defendants were ordered to "devise and prepare for immediate implementation of a special education program designed to satisfy the requirements of the St. Croix population as a whole." The case of *Saunders v. Prince Georges County Board of Education* (1977*) involved a nonambulatory, blind, hydrocephalic, mentally retarded girl who had been excluded from educational programming because of her severe handicap. Within 30 days after this suit was filed, however, appropriate educational placements were arranged and the court action was dismissed. In the case of *Kruse v. Campbell* (1977), the plaintiffs charged that the practice of the Virginia Welfare Department, which required that poor parents of handicapped youngsters relinquish

custody of these children before full funding of private educational placements by the state could take place was in violation of PL 94-142 and Section 504. Although the court found for the plaintiffs, it did so on purely Constitutional grounds rather than relying on PL 94-142.

The plaintiffs, in the case of *North Carolina Association for Retarded Citizens v. State of North Carolina Board of Public Education* (1978*), charged that they (as residents of four mental retardation centers in North Carolina) had been denied access to a free public education. A consent agreement was entered in which all school-aged residents were guaranteed appropriate placement. Finally, in the case of *Campochiara v. Califano* (1978*), a learning disabled child alleged that he had been denied a free, appropriate education and a due process hearing when the local education agency recommended placement in a private day care facility. The plaintiff demanded that the Department of Health, Education, and Welfare withhold PL 94-142 funds from Connecticut until proper educational placement was provided to this person. The court ordered a due process hearing be held, but stated that an individual does not have the legal standing to stop PL 94-142 funds.

As is evident from the cases cited in this section, handicapped individuals do, indeed, have the right to treatment and to education. Conjunctively, this treatment/education must be appropriate for each individual's needs. A discussion of the cases relating to the "appropriateness" of the treatment/education offered to handicapped individuals is necessary before specific interventions can be explored.

Appropriate Treatment

Directly related to a handicapped person's right to treatment and right to an education is the quality of that treatment/education. The overriding premise is that a handicapped person must have made available to them a treatment/educational program that is appropriately suited to his/her individual needs. This is the case for both institutional settings and educational settings, and is the source of much federal litigation.

Treatments in institutions have historically consisted of a variety of techniques designed primarily for patient control. Traditionally, these "treatments," when under the supervision of a physician, had not been subject to judicial inspection. This practice came to an abrupt halt in 1973 when the court ruled in *Knecht v. Gillman* that simply calling a technique "treatment" would no longer insulate it from judicial scrutiny. Courts then, began to closely examine exactly what type of treatment was being offered to handicapped persons residing in institutions.

Individualized treatment was mandated in the case of *Moralis v. Turman* (1974) in which the court specifically stated that group approaches (i.e., a therapy provided to a group rather than a therapy for an individual) are not treatment. In *O'Connor v. Donaldson* (1975) and *Donaldson v. O'Connor* (1974), a treatment described as "Milieu therapy" was found to be inadequate and in *Saville v. Treadway* (1974), it was found that the retarded as a class have the right to re-habilitative service. Individualized treatment plans were mandated in *New York State Association for Retarded Children v. Rockefeller* (1973) as they were in *J. L. v. Parhan* (1976). Individualized treatment plans were also ordered in *Wyatt v. Stickney* (1972) and *Wyatt v. Aderholt* (1974), with adequate care defined as including both medical and mental health services in *Newman v. Alabama* (1977). Clearly, no longer would minimal care be an accepted standard in residential institutions. Rather, individualized treatment plans designed to include all necessary services needed for complete re-habilitation of all residents are the order of the day. Courts have also found that when an individual is committed to an institution, treatment plans must also be specified. In *Welsch v. Likins* (1974), the court stated that failure to provide rehabilitative treatment to institutionalized persons may well mean commitment for life for the mentally retarded, therefore, adequate re-habilitative treatment must be provided whenever an individual is committed to an institution. Similarly, in *United States v. Jackson* (1976), the court held that the commitment of the retarded to an institution can withstand constitutional review, only when it is associated with "minimally adequate habilitation." Finally, in *Haldeman v. Pennhurst* (1977) (another landmark case), the court found that the Pennhurst Institution had indeed violated the rights of its clients under Section 504 of the Rehabilitation Act of 1973 by isolating them from society and by denying them a *minimally adequate re-habilitation* program which included the provision of education in the least restrictive

environment. The court ordered the Pennhurst Institution to provide its clients with the least restrictive community living arrangement and with a minimally adequate re-habilitation program.

Developing concurrently with the specification of adequate treatment in the institutions has been the concept of an appropriate education in the least restrictive environment within the public school system. The concept of the least restrictive environment has been adequately discussed in an earlier section of this paper, however, the concept of the configuration of an "appropriate" education merits detailed discussion. Public Law 94-142 mandates that each child must have made available to him/her a free and appropriate education (121a.1). This education must include all special education and related services necessary to enable this child to achieve his/her maximum potential. Special education refers to those educational services necessary for each child, and includes *any* type of training needed by a particular child (e.g., self-care, toilet training, vocational skills in addition to academic tasks). Public Law 94-142 also lists 13 related services which must be provided when needed in addition to the special education. These services are: (a) audiology; (b) counseling services; (c) early identification; (d) medical services; (e) occupational therapy; (f) parent counseling and training; (g) physical therapy; (h) psychological services; (i) recreation; (j) school health services; (k) social work services in schools; (l) speech pathology; and (m) transportation. The regulations also state at the end of the definition: "The list of related services is not exhaustive and may include other developmental, corrective or supportive services (such as artistic and cultural programs, and art, music, and dance therapy), if they are required to assist a handicapped child to benefit from special education" (121a.13). The law is, in effect, saying that anything that will enable the child to learn must be provided by the schools.

The development of this definition of "appropriateness" was, however, a difficult task, and its universal acceptance is not yet realized. A landmark case in this area was *Fialkowski v. Shapp* in 1975. The Fialkowskis were multiply handicapped children with the approximate intelligence of pre-schoolers, however, the program in which they were placed emphasized academic skills such as reading and arithmetic. The plaintiffs contended that this essential academic placement denied them instruction from which they could benefit. The defendants countered with an interesting argument based upon the case of *San Antonio Independent School District v. Rodriguez* (1973) in which the Supreme Court had ruled that if minimally adequate educational services were offered to all, then the fact that some students received better services than others is not a violation of the law. However, in *Fialkowski*, the court found that the services, in fact, offered the children no change to benefit, and were, therefore, in violation of the law. Also the court noted that the *Rodriguez* case had stated that Constitutional right would be violated if the schools functioned "to the peculiar disadvantage of any suspect class," and the court found that the Fialkowskis were indeed members of such a class. The court concluded that the Fialkowskis must be offered an appropriate placement which would include: (a) multidisciplinary assessments; (b) written prescriptive educational programs; (c) periodic re-evaluations; and (d) diagnostic-prescriptive teaching. In a related case (*Frederick L. v. Thomas*, 1976), children with specific learning disabilities charged that they had not been afforded an appropriate education. As in the *Fialkowski* case, the court found for the plaintiffs and ordered the development of an appropriate educational offering. In a different vein, *Donnie R. v. Wood* (1977*) involved the suspension of a 13-year-old boy for disciplinary reasons. The plaintiff contended that the disruptive behavior which led to the suspension was a result of his handicapping condition and, therefore, a suspension was actually a denial of an appropriate educational program. The court agreed, and ordered an educational assessment and subsequent appropriate placement. Similarly, the case of *Stuart v. Nappi* (1978) ordered the re-evaluation and reinstatement of a learning disabled child who had been expelled for disciplinary reasons. The court held that the schools could not deny services to a child who exhibited behavioral problems due to her educational placement, however, the schools should consider a more appropriate placement. In the case of *Lora v. New York Board of Education* (1978), the court found that children are entitled to adequate treatment, adequate diagnosis, program classification and satisfactorily equipped and staffed schools without regard to racial or cultural bias. Finally, in the case of *In Matter of Richard G.* (1976*), the court ordered that special education services must be provided during the summer months if the child needed such services to keep from regressing. However, if it were not clear that the child required such services, then none would have to be provided.

Clearly, an appropriate educational and/or treatment offering must be made for all handicapped

individuals. The development of this concept has been a long time in the making, but it is one which has firmly established itself as the law of the land. As time progresses, treatment/education programs will become even more appropriate as technological advances allow more effective programming.

Consent and Human Rights Committee

The legal considerations involved in the use of educational and behavioral principles to teach exceptional children revolve around the concepts of: (a) the right to give and withdraw consent; (b) the right to receive treatment in the least restrictive educational/programmatic alternative; and (c) the right to adequate control and review of the use of aversive and reductive behavioral techniques. Attaining the informed consent of the individual, his parents or guardian, and the consent of the Human Rights Committee are central to this issue.

Informed Consent

Informed consent is the written consent that is obtained from the individual, his/her parents, legal guardian or other specified person, stating awareness of the treatment procedure, the techniques to be used, the anticipated behavioral outcome of the procedure, and all the known side effects and risks inherent in its use (Stapleton, 1975).

Martin (1975) notes that the receipt of proper consent is predicated on the individual's capacity to understand that to which he/she is consenting, as well as the consent being given voluntarily. An individual's capacity to consent is based on his/her age (e.g., the student must be of legal age) and upon his/her intellectual capability to understand the program and the procedure for which consent is being sought. In most cases dealing with students either in the schools or in institutions, consent will have to come from the student's parents or appointed guardian. The voluntary granting of consent is usually judged to have occurred if there has been an absence of coercion or duress in securing the consent (Goldiamond, 1975).

Friedman (1975) and Martin (1975, 1979) have recommended procedures to be followed when seeking informed consent to protect student's rights. Martin (1979) recommends 31 separate issues that should be considered when a consent is being sought, while Friedman (1975) has recommended legislation which would require states to appoint and maintain Human Rights Committees and Peer Review Boards to review proposed treatment programs. Both of these recommendations are directed toward the protection of the student and professional, and the development of a systematic means of securing and following-up an individual's due process rights through informed consent.

The *Wyatt v. Stickney* (1972) decision specifies that consent by parents or guardians can only be given after they have been provided the opportunity to consult with program staff, independent specialists, and legal counsel. The Federal Register (1975) states that an exceptional child may only participate in a behavior modification program with the consent of a parent or legal guardian. This consent by a legal guardian or parent is extended to cover those parents who have surrendered their guardianship to the state.

The procedural process for establishing proper documentation prior to receiving informed consent includes: (a) an accurate description of the treatment procedure to be used with the behavior; (b) a description of, and data from non-aversive treatment procedures that have already been implemented to remediate or teach the behavior (e.g., Only after other techniques have failed may aversive therapy be used, "where it can save the individual from . . . self-injury, where it allows freedom from physical restraints which would otherwise be continued, when it can be administered for only a few short instances, and when its goal is to make other non-aversive therapy possible" (Wyatt v. Stickney, p. 27)); (c) a justification for the proposed treatment program to remediate the behavior (e.g., Aversive procedures may be used only if a client presents a clear and present danger to his own physical safety or the physical safety of others.); (d) baseline data recording procedures; (e) the anticipated behavioral outcome, as well as the expected termination data for the program; (f) the qualifications of persons who will be implementing the treatment procedure; and (g) the written consent and review of the Human Rights Committee. Finally, the program must always be part of a

written, comprehensive, positively oriented individual treatment program stated in objective behavioral terms. All of the above must be accomplished prior to seeking the informed consent of the parents, legal guardian or other designated individual. Also, consent may be withdrawn by the parents, legal guardian, or the Human Rights Committee (for a justifiable reason) at any time, and the program will then be terminated immediately.

Review Committee

The U.S. Department of Health, Education, and Welfare's (1971) *Institutional Guide to DHEW Policy on Protection of Human Subjects* requires that all institutions receiving federal funds have a permanent Human Rights Committee to review program proposals before implementation. These Human Rights Committees have the responsibility to monitor, and evaluate all aversive and deprivation procedures utilized by the agency it serves. Friedman (1975), in his proposed standards to govern Human Rights Committees, expands their purpose to include all initial review of all behavioral intervention procedures. Under the proposed guidelines, all reinforcement programs would be included in the initial review by the Human Rights Committee as well as all extinction programs. As such, all teaching that involved the use of contingent reinforcement (there is no discrimination made between social, primary, or activity reinforcers) would at least initially have to be reviewed and approved by the committee. Subsequent to initial approval, these programs could be employed without consent when "employed in accordance with proper professional standards" (p. 97). Each application of such procedures must be reported to the committee within seven days of the program inception. Other programs, however, would require the full consent and review procedure.

However global or restrictive the scope of the Human Rights Committee, its function is essentially stable. This body must issue written approval for the use of aversive treatment techniques. The procedures for receiving that approval will vary from institution to institution, however, they are essentially the same as those listed for receiving informed consent. The treatment team must present the committee with (a) a description of non-aversive treatment techniques employed previously to remediate the behavior, and the result of those interventions, which includes the data from each of the treatment techniques; (b) a description of the intervention strategy that is being requested for approval, which includes the data collection mode and baseline data; (c) statements that indicate that the behavior presently interferes with the client's treatment plan; (d) a description of the behavioral outcome that is anticipated as well as the possible side effects that may occur as a result of the intervention strategy; and (e) the dates for staff review of the treatment, and provisions for at least daily collection on the behavior. Cook, Altman, and Haaviik (1978) note that the Human Rights Committee should also be given a copy of the consent form and a summary statement about the client which includes: information on his social history, educational background, prior medical history, and current adaptive behavior skills. However, one problem associated with Human Rights Committees is that they often prevent rapid treatment implementation due to the volume of material they must review and the time involved in the review process (Repp & Deitz, 1978).

Once the Human Rights Committee and the student, parent, or legal guardian have given their informed consent, the practitioner is responsible for providing the treatment as indicated, keeping the necessary data, reviewing the data, and reporting at least monthly on the progress of the program to the Human Rights Committee. Ethically, this same report should be made available to the parents or legal guardian of the client.

Ethical Questions

While the procedural constraints listed above are laudable and necessary to protect the rights and dignity of the handicapped individual, there are several ethical questions that must be considered that may, in fact, be seen as criticisms of the above constraints. The possibility that a program intervention which first uses the least restrictive alternative and positive approaches may not be effective in the treatment of severe behavioral problems (e.g., self-injurious behavior, aggression, rumination) merits consideration. This is best illustrated through the use of extinction procedures with self-injurious

clients. Lovaas (1973) noted that some individuals who were placed on an extinction program for self-injurious behavior continued to emit the response for 10,000 or more times prior to achieving the extinction result. Clearly extinction, while defined as being positive in nature and one of the least restrictive alternatives, is definitely not a functional intervention procedure with a life threatening behavior such as self-injurious responding. Extinction allows the client to continue to damage himself for a prolonged period of time. In similar cases, the practitioner must examine the question of the long-term consequence of not implementing a speedy and effective procedure. The accumulated result of severe behaviors can be much more restrictive to the client's activity than employing a carefully planned, intensive, behavioral reductive procedure over a short time. Thompson and Grabowski (1971) note that the practitioner must balance the degree to which the client's rights are being abridged by the intervention procedure against the danger that his behavior poses to himself or others. They also note that the practitioner who fails to use speedy reductive methods with a client who is exhibiting severe behavior (e.g., self-injury) would potentially be seen as legally liable on the ground of neglect.

Clearly, the practitioner faced with the provision of treatment to exceptional students is faced with a complicated situation. (S)He has to: (a) survey the client's present behavioral situation; (b) review past intervention strategies; (c) safeguard the rights of the client by attempting least restrictive programmatic alternatives first; (d) determine the possible causality; (e) determine appropriate intervention procedures; (f) secure baseline data measures; (g) train the intervention staff; (h) secure written consent from the Human Rights Committee; and (i) also receive informed consent from the parents or other legal guardian. All this must be balanced against the client's need and right to speedy and adequate treatment.

The Right to Refuse Treatment

Through judicial review and legislation, the exceptional child now has a fairly well documented right to receive treatment. The corollary, the right to refuse treatment, has also been argued, and under some circumstances been upheld as a right of exceptional children. For example, in *Griswold v. Connecticut* (1965), the court found that exceptional children has the right "to be left alone." The court ruled that in order for the state to interfere with an individual, a compelling state interest for such interference must be demonstrated. Spece (1977) has noted (from First Amendment right to privacy) that an exceptional child and/or his/her parents or guardian, should have the right to refuse treatment that would "drastically intrude into his person or engender gross changes in his behavior or thought patterns" (p. 617).

This right to refuse treatment has received the attention of the Mental Health Law Project, as reported by Martin (1979), which has recommended regulations to govern the circumstances when an individual refuses treatment. The guidelines list several conditions under which an individual can refuse, through administrative appeal to the Human Rights Committee, to receive specific treatment(s). Some of them are: (a) when the objectives of treatment or the conditions of treatment are not in the student's best interest or necessary to protect him/her or others from harm; (b) when the treatment is not prompt, adequate or appropriate; and (c) when the treatment or the conditions of treatment are not in accordance with the principles of the use of the least restrictive means possible (see Least Restrictive Alternative).

Although these three reasons have been noted by the Mental Health Law Project, the list put forth is certainly not exhaustive. Martin (1979) lists 14 reasons to refuse treatment. They are:

1. *Incorrect Placement:* If a student can argue that he/she has been incorrectly placed, then any treatment within such placement would also be seen as inappropriate.
2. *Experimental and Hazardous:* If the treatment can be identified as experimental or hazardous and specific consent from the individual or his/her parents or guardian (see Informed Consent) is not given, then such treatment may be refused.
3. *Prohibited Treatment:* If the treatment can be shown to be prohibited by state or local guidelines or regulations, then such treatment may be refused.
4. *Infringement of Religious Freedom:* If the treatment prohibited an individual from attending

religious services, meeting with representatives of the church, or reading religious material, then such treatment may be refused.

5. *Interferes with Mental Processes:* If the treatment may affect an individual's ability to think, then such treatment may be refused.

6. *Due Process:* If the treatment may change an individual's placement without the provision of a hearing, then such treatment, based on an individual's right to due process, may be refused.

7. *Assumption of Incompetency:* If the treatment is to be provided over the individual's refusal to participate, without first following due process requirements, such treatment may violate the individual's right to refuse treatment.

8. *Punishment:* If the treatment causes the individual to experience discomfort or pain, such treatment may be refused.

9. *Invasion of Privacy:* If the treatment intrudes upon an individual's intellect, or corporal integrity (both of which are privacy areas protected by the constitution), such treatment may be refused.

10. *Involuntary Servitude:* If the treatment requires an individual to perform work without providing compensation for such work, such treatment may be refused.

11. *Provision in a Restrictive Environment:* If the treatment is provided in an environment which is not the least restrictive environment in which the individual is capable of functioning, such treatment may be refused.

12. *Denies Access to Review:* If the treatment does not allow an individual to contact either an attorney or a Human Rights Committee to request review of his program or release from such program, then such treatment may be refused.

13. *Not Treatment:* If the treatment is not individualized or if it does not have specific goals relating to the habilitation of the individual, such treatment may be refused.

14. *Nonfunctional Treatment:* If the treatment is poorly planned, not "best-present-practice," or has not been allocated the materials necessary to make it work, such treatment may be refused.

In light of the above points, and the development of specific guidelines (Mental Health Law Project, as reported in Martin, 1979), dealing with individuals exercising their right to refuse treatment, professionals as therapists, administrators, and supervisors of treatment providing programs, and researchers as those evaluating program effectiveness and providing experimental treatments must be aware of and adhere to guidelines and regulations which protect an exceptional child's right to refuse treatment.

Applied Techniques Used to Change Behavior

Many techniques developed and utilized by various theoretical and professional groups have been used with exceptional populations. As such, these techniques can roughly be subdivided as: (a) psycho-surgical interventions; (b) pharmacological interventions; and (c) behavioral interventions. These intervention techniques have touched all exceptional populations, however, the mentally retarded, and specifically those residing within institutional facilities have most frequently been the apex of professional and judicial review. As a group, these three classes of interventions can nicely be divided, although in practice this is rarely possible. Frequently, exceptional children will be receiving both behavioral and pharmacological treatment for a common problem (e.g., hyperactivity, self-injurious behavior) or for completely dissimilar problems (e.g., aggression and epilepsy). In such cases, the treatment effects of one intervention may be masked by the treatment effects of the second intervention. Taken as a whole, however, all forms of therapy with exceptional children have received the attention of the public, the courts, and the treatment professions.

The following issues were inherent in these reviews: (a) was consent sought and received from the individual, the Human Rights Committee, and at times a professional review panel; (b) were the individual's due process rights observed; (c) did the treatment follow the doctrine of least restrictive alternative? In fact, in *Mackey v. Procunier* (1973), the court questioned whether therapy assigned to change a person's behavior was not "impermissible tinkering with the mental processes." As developed earlier, the individual has the right to refuse consent as does the Human Rights Committee,

but the question remains as to what rights an individual does have, besides consent or its refusal, when professionals seek to provide him/her with treatment. Several court cases have specified rights that may not be abridged when providing the individual with treatment (*Davis v. Watkins*, 1974; *Inmates of Boys Training School v. Affiek*, 1972; *Morales v. Turman*, 1973; *Wyatt v. Stickney*, 1972). Those rights enumerated in *Wyatt* (1972) have frequently been utilized as a pattern for other rights stipulations (e.g., *Davis v. Watkins*, 1974). Briefly, they include the rights of an individual in an institution to: (a) personal communication (e.g., phone calls and mail); (b) meal privileges; (c) clothing privileges (e.g., clean, adequate, personal clothing); (d) space privileges (e.g., minimal "square footage" requirements for room type and student numbers); (e) climate control privileges (e.g., adequate ventilation and temperature regulation); (f) hot water privileges (e.g., temperature regulation); (g) living room privileges (e.g., furniture, lighting, recreation and privacy); (h) bathroom privileges (e.g., number of toilets and lavatories, toilet paper, soap, towels, number of showers or tubs and provision of individual screens for each); (i) housekeeping privileges (e.g., regular housekeeping by staff); (j) religious privileges (e.g., opportunity to worship on a non-discriminatory basis); (k) exercise privileges (e.g., opportunity for daily physical exercise); (l) medical treatment privileges (e.g., prompt medical treatment); (m) grooming and self-help training privileges (e.g., daily toothbrushing, bath, and regularly scheduled haircuts, and toe and fingernail cutting); and (n) educational privileges (e.g., opportunity to attend public schools and receive educational training at a level suitable to the individual.

Least Restrictive Alternative

The concept of employing the least restrictive programmatic alternative (LRA) is usually said to stem from the due process clause of the Fourteenth Amendment of the Constitution. The concept of least restrictive environment (LRE) calls for education/rehabilitation to occur in the environment which is least restrictive to the individual, and hence is also based on the due process clause of the Fourteenth Amendment. The differentiation occurs in the subject matter covered by the two terms. LRE is essentially a placement decision. Through the determination of the LRE, the individual is placed in a specific education-rehabilitation setting(s). LRA refers to the enrollment of an individual in a specific situation which will use particular techniques to change the student's behavior. Confusion often results (in the literature and interpersonal communication) as the terms involve many of the same words (e.g., placement, program, enrollment). The one (LRE) deals with placement, the other (LRA) deals with programming. Budd and Baer (1976) defined LRA as occurring when the state can demonstrate that the programmatic means employed curtails an individual's freedom to no greater extent than that necessary to achieve the stated goal. Friedman (1975) stated essentially the same thing, but with the following modification, "the state must demonstrate that the program is in the (student's) best interest" (p. 24). Martin (1975) expanded the concept further when he noted that the state must show why a less restrictive alternative to the proposed treatment would not be worth pursuing. Further still, Thompson and Brabowski (1977) wrote that when a "procedure is employed which may restrict or violate a (student's) rights one must be able to demonstrate that less restrictive alternative treatments have been employed and have failed to deal with the problem" (p. 502). This latter position is consistent with application procedures to Human Rights Committees.

Although general agreement can be reached on what least restrictive alternative means, the term's implications for treatment has received no such general consensus. Switzky and Miller (1978) have suggested that looking at the mode of instruction (programming) may be a potentially useful approach in determining restrictiveness of programmatic procedures, however, they point out that such a system of examination will fail to consider the social/ecological environment of the child beyond the academic setting. Just such an approach is, however, generally used. Programmatic alternatives are arrayed in a Likert-like progression from definitely mild to extremely restrictive. The professional is required to choose or discover the program with the least restriction and must, therefore, begin with the mildest program and gradually proceed to stronger treatments only when the weaker prove ineffective (Budd & Baer, 1976). This systematic progression from least restrictive-inadequate to the least restrictive-adequate treatment has its own set of ethical and possibly legal problems. Initially, a professional is faced with inexact information as to the effectiveness of treatments on a continuum of

restrictiveness for a particular subject whom (s)he may be treating. Although pharmacology and psychosurgery have potentially greater replication results than do behavioral techniques on which to base the decisions of professionals who may choose to employ these techniques, evidence suggests that these therapies show a great deal of variation in both their effectiveness for a given individual and in their side effects (e.g., see indications, contraindications, precautions, and adverse reactions sections for any drug listed in the Physician's Desk Reference, 1978). When the professional chooses to use techniques that generally come under the rubric of behavior modification or applied behavior analysis, these same problems also abound due to the tremendous individual differences that occur within and across exceptional classifications and individual variations within each student's personal reinforcement history.

In addition to choosing a technique that on absolute scale is less restrictive than others, and also figuring in the possible effects of individual variability, some authors (Brooks & Baer, 1975; Stoltz, 1977; Thompson & Grabowski, 1977) have suggested that the professional needs to consider the efficiency of a program. Are mildly restrictive treatments that will work, given a long period of time, less or more restrictive than powerful but restrictive treatments which work quickly? The reader is asked to review the Lovaas (1973) example cited earlier for a poignant illustration. Perhaps with serious behavior problems, professionals should consider the time required to experiment with increasingly restrictive treatments as a significantly restrictive factor in itself (Budd & Baer, 1976).

As a final point, Stoltz (1977) noted that a common method used by the professional to choose the method which is least restrictive to the student is to provide the student with several choices of programs from which he/she may chose (i.e., May, Risley, Twardozz, Friedman, Bijou, Wexlen, et al., 1975). She noted that this offering of choice is "illusory" in nature as the choices made by the student will be consistent with the existing environmental variables (e.g., the need for subjects on the part of a researcher, the need for fewer students on the part of a teacher, or the subject's personal reinforcement history).

The doctrine of the least restrictive alternative is a tie that binds one to decisions based partially on a student's right to receive the least restrictive form of treatment and partially to absolute values for treatments with no restrictions. Through litigation (*Wyatt v. Stickney*, 1971, 1972) and legislation (PL 94-142), educators are bound to the concept of least restrictive treatment alternative. The issue will remain controversial for professionals (as practitioners), administrators (as program supervisors), researchers (as program developers) and perhaps the courts when deciding if specific or general regulation should be the guide, or if there are variables of human behavior which demand a treatment of that behavior which no regulation can unequivocally address.

Techniques Used to Change Behavior

Techniques that change the behavior of exceptional children have also come under judicial review and regulation through legislation. Those behavior changing techniques commonly used to increase or accelerate behaviors have received little attention with perhaps, the exception of token economies. However, procedures such as DRH (differential reinforcement for high rates of behavior), shaping, chaining, task analysis and contingent reinforcement have faced little review by the courts and lawmakers. Token economies have received attention in the literature for two reasons. First, token economies develop an artificial economic situation where tokens can be earned and exchanged for reinforcing items or events. As such, judicial attention (e.g., *Wyatt v. Stickney*, 1971) has focused on the protection of students' rights or privileges which are not to be manipulated by token economies (these privileges were discussed earlier in the introduction to this section). Secondly, token economies often have as a subcomponent of the program a response cost system. Under such a system, fines are levied on an individual who has offended the rules which govern the token economy. As such, this response cost can be construed as aversive treatment and come under the protection of the due process clause of the Fourteenth Amendment. However, token economies have received very little judicial or regulatory (legislative) attention.

Behavior change techniques (e.g., behavior modification, applied behavior analysis, psychopharmacology) are widely used by professionals working with exceptional children. They are widely

used because they appear to work, yet many procedures and techniques are still experimental in nature and should be subject to clear legal boundaries (Robinson, 1973). Robinson's (1973) contention is clearly supported by the available diverse literature on the subject. One entire issue of the Arizona Law Review (1975) is devoted to the discussion of approaches to behavioral change. In fact, Risley (1975) has argued for some restriction on the use of behavioral treatments. In an institution he found "behavior modification procedures were being seriously misused . . . due to lack of proper training and supervision, he, therefore, recommended that certain limited procedures, whose effectiveness has been well documented, be certified for use under specific circumstances . . . while other more experimental procedures be subject to tight restrictions" (Budd & Baer, 1976, p. 209).

Aversive Treatment

Martin (1979) notes that aversive treatment may include the contingent application of noxious or painful stimuli, such as: (a) painful or unpleasant body contact (e.g., physical restraint, striking, slapping, spanking, pinching, or overcorrection); (b) unpleasant or bitter tasting foodstuffs; (c) electric shock; and (d) drugs intended to induce painful bodily reaction. Budd and Baer (1976) list essentially the same treatments but also include: (a) seclusion; (b) hard labor; (c) sterilization; (d) stimulation of the brain by electronic means; and (e) brain surgery. The argument surrounding these treatments usually stems from the Eighth Amendment proscription against cruel and unusual punishment, however, other arguments have been put forth. For example, Ross (1972) reports that the practice of using aversive procedures with some behaviors may encourage their use by paraprofessionals. However, the use of aversive techniques is not totally encompassed by problems. The ". . . selective application of aversive conditioning can be a highly humanitarian procedure. It can free individuals from their crippling behavior . . . and thereby enhance their opportunities to develop their human qualities" (Ross, 1972, p. 146). Also, Budd and Baer (1976) correctly point out that there is a great deal of difference between relatively mild aversive techniques (e.g., short timeout) and more severe aversive techniques (e.g., electric shock). The controversy over the use of aversive therapy does, however, remain. The courts (*New York State Association for Retarded Citizens v. Carey*, 1975; *Wyatt v. Stickney*, 1971, 1972) have ruled that: (a) aversive treatment may be used only under the supervision of and in the presence of mental health professionals; (b) aversive treatments which are used to decrease behavior that serves only institutional (school) convenience are prohibited; and (c) aversive programs to reduce behaviors can only be used after a physician has certified that the behavior is not physiologically caused. Many such safeguards are simple and straightforward. For example, Martin (1975) suggests that if a treatment is used frequently over a long period of time in an attempt to change the same behavior, then it may not be effective therapy, but only unauthorized punishment. In an attempt to deal with therapies that may be thought to be aversive, several groups have promulgated guidelines about the receipt of informed consent and the utilization of therapy techniques (American Association on Mental Deficiency, 1978; Cook, Altman, & Haavik, 1978; Friedman, 1975). In all cases, the individual is protected from unjustified, illegal, or aversive treatments without first observing his due process rights (i.e., informed consent, consent of the Human Rights Committee, and at times, consent of a peer review committee and application of the concept of least restrictive alternative).

Punishment

The more restrictive type of therapy commonly thought to be aversive is that of corporal punishment. Ballentine's Law Dictionary (1969) describes corporal punishment as, "Physical punishment; any kind of punishment inflicted on the body, such as whipping or slapping . . ." The courts have been quite single-minded in their rulings on this issue. Almost all rulings have held that corporal punishment with exceptional children is expressly forbidden (*David v. Watkins*, 1974; *Horacek v. Exon*, 1975*; *New York State Association for Retarded Children (NYARC) v. Carey*, 1975*; *Wyatt v. Stickney*, 1971, 1972). The one exception is *Morales v. Turman* (1973) which allowed slaps in extreme circumstances. The courts have always chosen to consider punishment in the sense of the

previously mentioned definition (Ballentine, 1969), and have not chosen to consider punishment in its commonly accepted behavioral sense. Punishment is behaviorally defined as the presentation of a stimulus contingent upon a behavior which reduces the rate of emission of the behavior (Azrin & Holtz, 1966; Sulzer-Azaroff & Mayer, 1977). This definition changes considerably the scope of the term. Using this definition many things can be termed punishment which do not fall neatly into the court's definition. However, no form of punishment should probably occur unless strict guidelines are followed. In fact, here too specific guidelines have been suggested (Repp & Deitz, 1978).

Shock

One of the most controversial of behavioral reductive techniques is the use of contingent electrical (shock) stimulation. In this case, the hypothesis is that the contingent presentation of the aversive event (shock), whenever a specified behavior occurs, will reduce the probability of that behavior occurring in the future. In fact, shock has been used successfully to reduce several types of behavior, however, most frequently it has been utilized with self-injurious behavior (e.g., rhythmical responses which may include: headbanging, eye-gouging, scratching, pinching, biting, punching, or slapping) with general success (Corte, Wolfe, & Locke, 1971; Risley, 1968; Tate & Baroff, 1966; Yeakel, Salisbury, Greer, & Marcus, 1970). The *Wyatt* court (1972) approved the use of contingent shock therapy only to prevent self-injurious behavior which was tending to produce physical damage, and then only after other treatments had failed, and only with informed consent, approval of the Human Rights Committee, and under order of the superintendent of the facility. Shock could be used when other treatments had failed, when it might save the student from immediate and continues self-injury, when it allowed freedom from physical restraint, when it could be administered for only a short time, and when its goal was to make less aversive therapies possible (Martin, 1975). The court's position, as well as professional ethics, would presently not allow the use of contingent shock therapy in any but the most extreme cases of behaviors that were not treatable by other, less restrictive alternatives.

Drug Therapy

The use of medications to alter the behavior of exceptional individuals has long been an accepted treatment technique. Wolfensberger (1970) reports that for 30 years (earlier in this century), scientists sought a "magic bullet" (e.g., chemical compound, drug) which would "cure" mental retardation. One such compound was glutamic acid (i.e., an amino acid found in the casing of cow's milk) which increases the oxygen uptake in the brain. If the oxygen level in the brain could be increased, scientists postulated that retardation might be minimized. This, of course, was not the case, and experiments with glutamic acid no longer occur. Many other drugs have been used with exceptional populations either to modify intellectual or social behaviors. For example, LSD-25 (e.g., Simmons, Leiken, Lovaas, Schaeffer, & Perloff, 1966) has been used to increase the social interactions between severely disturbed (e.g., autistic) individuals and their teachers; L-5 hydroxtropotophan has been used to reduce severe self-injurious behavior in mentally retarded students identified as having the Lesch-Hyhan syndrome (Mizuno & Yugari, 1975); methylphenidate (e.g., ritalin) has been used with learning disabled students to reduce their hyperactive behavioral response (with success) and to increase their intellectual capacity (without success) (Krager & Safer, 1975; Hoffman, Engelhardt, Margolis, Polizos, Waizer, & Rosenfield, 1974).

Drugs have been used most frequently to reduce or punish behavior, or to prevent behavior than to increase behavior. When drugs are used to punish behavior, they usually have aversive physiological effects (e.g., nausea, convulsions, temporary suspension of respiration). The courts have dealt with aversive drug therapy in a uniform manner. For example, the court in *Knecht v. Gillman* (1973) ruled that the use of a drug as part of a behavioral treatment which induced vomiting constituted cruel and unusual punishment under the Eighth Amendment. The court also rejected the argument that classification of the drug as a treatment protected it from the Eighth Amendment proscription against cruel and unusual punishment. The extent of the problem was compounded as the staff had neither sought nor received the consent of the individuals involved in this "treatment." Tranquilizing drugs and

their administration to exceptional persons have received similar treatment by the courts. In *Welsch v. Likens* (1974), the court held that the excessive use of tranquilizing drugs to control the behavior of mentally retarded persons constituted cruel and unusual punishment. In a similar case (*United States ex rel Wilson v. Coughlin*, 1973), the court ruled that the staff of an institution for the mentally retarded were prohibited from further use of Thorazine (e.g., a major tranquilizer) or any other tranquilizer for the purposes of controlling behavior or punishment. The *Wyatt* court issued five regulations dealing with the use of drugs as therapy. They are: (a) the student has a right to be free of unnecessary or excessive medication; (b) prescriptions cannot be written for periods longer than 30 days; (c) staff must keep records on the effect of the medication; (d) physicians must review drug therapy at least weekly; and (e) drugs cannot be used as (1) punishment, (2) for the convenience of the staff, (3) as a substitute for a habilitation program, or (4) in quantities that interfere with a student's habilitation. The courts have, therefore, rejected the use of drugs with exceptional children as therapies used to change their behavior.

A related treatment technique is psychopharmacology, which Martin (1975) defines as an attempt to alter the brain's chemical structure (as was the use of glutamic acid) in order to alter an individual's behavior. An example of this procedure may be Feingold's (1974) K-P diet, which may reduce hyperactive behavior through a reduction of chemical food additives (see Rose, 1978 for a further discussion). Although no court cases have concerned themselves with the application of this therapy, it is likely that such treatment would require due process and consent procedures. A second consideration in the use of Feingold's therapy with hyperactive children is that the use of methylphenidate (e.g., ritalin) or behavioral programs to reduce hyperactivity may be avoided if the Feingold treatment were effective. The least restrictive alternative would appear to be a modification in diet rather than other forms of therapy. However, the Feingold diet has shown equivocal results and many studies of the diet have severe methodological faults. Therefore, the effectiveness of the therapy may first have to be proven before conclusions may be drawn as to its restrictiveness.

As with other therapies used to control behavior, the use of medication as a treatment program has been a major legal issue. The court, in *Horacek v. Exon* (1975) ruled that all drug therapy at an institution had to conform to the standards established by the Joint Commission on the Accreditation of Hospitals (1971). The most important part of these standards may be the required follow-up evaluation of the effects of drug treatment through the use of objective observations of therapeutically important behaviors (Budd & Baer, 1976). Only through the use of objective evaluation will permissible drug therapies be accountable.

Restraint

Restraint (e.g., physical movement is restricted or made impossible through either physical or mechanical means) has also received considerable judicial review. The court, in *Wheeler v. Glass* (1972), held that the restraint of two mentally retarded persons for 77½ hours constituted cruel and unusual punishment. The court rejected the argument that those persons in charge were acting in good faith as to the provision of treatment for these individuals. Also, the staff used this treatment as a punishment without first providing the individuals with their due process rights. Restraint has also been judged to be cruel and unusual punishment by other courts (*Pena v. New York State Department of Social Services*, 1970; *Welsch v. Likins*, 1974). In *Wyatt v. Stickney* (1972), the court ruled that restraint could not be used as punishment, but could be used to prevent injury to others or self-injury. The *Wyatt* court further stated that restraint could not be used as a substitute for a rehabilitative program or for the convenience of the staff. Restraint could only be used after other less restrictive therapies had failed and only under the authorization of a mental health professional. The following regulations applied to the use of restraint: (a) orders for restraint shall be written, and shall be good for periods of time not to exceed 12 hours; (b) the person in restraint shall be checked every 30 minutes and a record shall be kept of the check; (c) restraints shall be designed so as not to injure the person in restraint; (d) every two hours the individual in restraint shall be released for 10 minutes and be allowed to exercise; and (e) reports shall be made daily to the superintendent by the mental health professional who authorized restraint about the reason for restraint, the type of restraint used, and the duration of the restraint.

Restraint as a physical restriction of movement has been consistently held to be cruel and unusual punishment, except in those cases where an individual may cause injury to themselves or others. Even in these cases, regulations that protect the individual's rights have been quite stringent (*Wyatt v. Stickney*, 1972). The use of restraint as a treatment seems to be forbidden except in the most extreme cases, and then only after less restrictive alternatives have been attempted and have failed.

Timeout

Timeout procedures have been used frequently with exceptional children. Timeout is usually divided into: (a) seclusion (e.g., the individual is removed from the common environment); (b) withdrawal (e.g., the environment is removed from the individual, as in the case of a teacher turning away from a student); (c) contingent observation (e.g., the individual may watch but not participate in activities); and (d) contingent exclusion (e.g., the individual may not watch or participate in the activities, but is not removed from the environment). The courts have typically equated timeout procedures (as described above) with solitary confinement used in prisons, however, some courts have differentiated between several types of timeout and solitary confinement.

In *Morales v. Turman* (1973), seclusion was permitted only when it might prevent immediate physical harm to others or the student, prevent substantial destruction of property, or prevent behavior that substantially disrupts the institutional routine. A maximum limit for seclusion in *Morales* was set at 50 minutes. In other cases, seclusion in a locked room has been forbidden (e.g., *Horacek v. Exon*, 1975*; *New York State Association for Retarded Citizens v. Carey*, 1975). In *Wyatt v. Stickney* (1972), the court ruled that an individual had the right to be free from isolation. However, the *Wyatt* court made a distinction between isolation in a locked room and legitimate timeout procedure which could be used under the supervision of professionals in a behavioral program. The *Morales* court ruled that seclusion for disciplinary reasons was a sufficiently severe deprivation of liberty to require due process procedures, however, the court also ruled that timeout for a short period of time did not warrant full due process procedures.

The use of timeout with exceptional children is fraught with shady issues and problematic questions. For example: Is the use of contingent observation, contingent exclusion and withdrawal prohibited or constrained in light of *Wyatt* and *Morales*? Is only seclusion affected by these rulings, or only seclusion when accompanied by a locked door? Do full due process procedures need to be followed when using any timeout procedures, or just procedures that last longer than a few minutes? The answers to these questions are not clear. Recently, in a case involving the Sawyer Unified School District in California (Education for the Handicapped Law Report, 1978, p. 257), a letter of complaint was filed with the Office of Civil Rights alleging that the use of seclusion (unlocked door) with a hyperactive child was a violation of Section 504 of the Vocational Rehabilitation Act of 1973. The ruling by that office was that such procedures, when used as a behavior management procedure, posed no violation of 504. In this case, however, the complaint did not cite the child's possible due process rights or base its argument upon the cruel and unusual punishment clause of the Eighth Amendment. Therefore, although there is now a ruling on timeout as it concerns 504, all other questions still stand. The prudent as well as the ethical thing to do would be to seek informed consent, and the consent of the Human Rights Committee whenever employing seclusion timeout, but whether these consents are necessary when employing other forms of timeout is very unclear.

Other Forms of Treatment

Other treatments are also used to change behavior that may be thought of as aversive or punishing (e.g., aversive taste solutions, overcorrection), however, none of these have been the subject of direct judicial review. As they are commonly seen as behavior reductive techniques, it would be best if the concept of least restrictive alternative as well as informed consent and the consent of the Human Rights Committee were obtained prior to instituting treatment.

Regulations cited earlier in this section and guidelines cited elsewhere in this paper point out the practical need to use behavior change therapies only when one follows a logical procedure protecting

the individual's rights and documenting the procedure. Those guidelines suggested by Repp and Deitz (1978), the Department of Health, Education, and Welfare (1971), the Mental Health Law Project, and those of the American Bar Association/Commission of Mental Disabilities (reported in Martin, 1979) all are good models which may be adapted to meet the needs of an individual school or facility. The professional who provides service to exceptional children without knowledge of the current law, concern for the rights of the student, or attention to guidelines invites both professional and personal disaster. No longer can these issues inherent in the provision of treatment to exceptional populations be secondary considerations to administrators or to teacher trainers. The fine points in curricular development and management are not superseded by, but perhaps equalled by the teacher's role in an evolving legal/educational framework.

The Cost of Special Education

The financing of special education has been, and continues to be, the subject of litigation within the courts. The Federal Government recognized financing of special education as an issue in Section 3 of Public Law 94-142 (PL 94-142, 1977), when it states that, ". . . families are (sometimes) forced to find services . . . at great expense." Also, in the Developmental Disabilities Act (PL 94-103, 1975), the Federal Government states that it and the "States have an obligation to assure that public funds are not provided to programs which do not deliver appropriate treatment, services, and habilitation or do not meet appropriate minimum standards as specified in the Act." This point is also made in *Mattie T. v. Holladay* (1977*) where the court found that no school program supported by federal funds may deny appropriate educational services to a handicapped child. Therefore, the Federal Government has recognized the problem of finance in special education, and has taken steps to assure that, through the control of governmental financial aid, all exceptional children will receive at least minimally acceptable educational treatment at those facilities receiving government monies.

Although the Federal Government has published several regulations to assure the provision of services to exceptional children, and has stated that free, appropriate public education must be offered to these children, exceptional children still face barriers to these services. In the case of *Mills v. The Board of Education of the District of Columbia* (1972), the school board argued that the provision of special education services to all exceptional children within the district was impossible due to insufficient funds. This argument was rejected by the court who noted that the problems of the school could not arbitrarily be permitted to affect exceptional children more heavily than normal children. As will be noted later, the court's decision in the *Mills* case is clearly that which is supported by Federal Law and presently is seeing favorable support in a number of court cases, however, the result of litigation has not always supported this position.

In New York, financing for tuition-only or all-necessary-services has been decided based on the definition of a child as physically handicapped. New York State defines physical handicaps as deafness, blindness, and other physical handicaps (e.g., cerebral palsy, spina bifida) but excludes other exceptional children. Financing for the education of an exceptional child defined as other than physically handicapped has been limited to tuition-only when a child's education required placement in a residential facility (*In re Stein*, 1975*). The court stated that parents had a basic obligation to provide food, clothing, lodging and other necessities for the child even though it stipulated that the child's handicapping condition required residential placement on a 12-month basis. Later (*Matter of Levy*, 1976*; In re Davis, 1975*), the New York courts again supported the position that parents of other than physically handicapped children could be required to pay for part of their children's educational expense, and that this requirement does not broach the equal protection clause of the Fourteenth Amendment. Further, the New York courts (*In re Lee E. B.*, 1975*) set a limit on the cost of educating a handicapped child as did the federal courts in *Doe v. Laconia Supervisor of Union No. 30* (1975) by stating that the payment of tuition for special education was approved, but only at the state average tuition level.

Although there have been several cases denying full funding of the education of exceptional children, there have been those which support this funding. The courts in New York have repeatedly supported full funding for those students it defined as physically handicapped. In *L. v. State* (1972*), the courts held that a cerebral palsy child qualified as physically handicapped, and that the county in

which the child resides must provide the financial resources necessary to secure educational services for the child. This position has also held true in other cases where the city (*In re H_1*, 1971; *In re H_2*, 1972*) or the county (*In re Borland*, 1975*; *In re Jetty*, 1974*; *In re K.*, 1973*; *In re Leitner*, 1972*; *Michael C. v. State*, 1975*) have been instructed by the courts to provide the financial support necessary for educational services within or outside the county, and/or in residential placements. Outside New York, there has also been support for publicly financed special education. In *Natonabah v. Board of Education of Gallup-McKinley City School District* (1973), the court determined that the school system must provide financing for school programs to all students on an equal basis. The courts contention that school districts must pay for special education is also noted in *Denver Association for Retarded Citizens v. School District #1* (1975) where the court mandated school district financing of special education services for the mentally retarded. In *Oster v. Bevilacqua* (1978*) and *Oster v. Boyer* (1977*), the plaintiffs sought to have a Rhode Island law declared illegal. This law allowed a Local Education Agency (LEA) to relinquish responsibility for the education of exceptional children who are placed in facilities under the direction of the State Department of Mental Health, Retardation, and Hospitals (DHRH). The plaintiffs argued that, subsequent to placement in DHRH facilities, the parents of such children are required to contribute a considerable sum for these programs. As such, the state was misrepresenting the Rhode Island public schools to the Bureau of Education for the Handicapped by stating (in approved state education plans) that all handicapped children in the state were receiving a free appropriate education. In another case (*Kopsco v. Riles*, 1977*), the California public schools were charged with violation of California's constitutional equal protection clause. When school districts sent exceptional children to private schools because they could not provide educational services to those children, they provided the parents with insufficient funds to cover the full cost of the private education. California's public schools are now obligated to pay full tuition, transportation, and maintenance costs of private school placement when they can offer no appropriate placement within the schools. The same conclusion was reached in federal court (*Kruse v. Campbell*, 1977), however, this decision rested only on the Vocational Rehabilitation Act, Section 504 (PL 93-112, 1974) which establishes that educational rights of the handicapped are federal civil rights. This issue, however, continues to receive legal review through litigation. In the case of *LeClerc v. Thompson* (1978), the plaintiffs, as in *Kopsco v. Riles* (1977*), alleged that subsequent to placement in private educational settings, the LEA's have only provided partial funding for the placement. They further alleged that this partial funding is a violation of Section 504 (PL 93-112, 1974) and are seeking the provision of appropriate education at no cost to themselves. In the southwest (*Howard S. v. Friendswood Independent School District*, 1978*), the courts upheld the public funding of the education of exceptional children in private facilities through regulations associated with Section 504 (PL 93-112, 1974; PL 94-142, 1977), and the Fifth and Fourteenth Amendments to the United States Constitution. However, in *Washington v. Dannon and White* (1977), the court held that the state is not obligated to pay for rehabilitation/education of mentally retarded persons in private facilities when they have been convicted of a crime and are on probation. The difference, as the court saw it, is that the parolees would have a right to treatment if committed but had none when not committed (e.g., on probation).

Although there are court cases on both sides of the financial issue, the record from the litigation shows a clear swing toward the establishment of financial responsibility on the part of the state and the school districts and away from the parents. As Reed Martin (1979a) states, ". . . under the U.S. Constitution, PL 94-142 and Section 504, schools must provide education at no cost to the parent" (p. 321).

Employment

No discussion of the legal rights of the handicapped would be complete without first considering their employment rights. A primary purpose of the educational system is to adequately prepare

handicapped students for meaningful and fulfilling careers, hence the process known as career education has become an important aspect of most educational programs. Career education has been defined by Brolin and Kolaska (1979, p. 102) as "the process of systematically coordinating all school, family and community components together to facilitate each individual's potential for economic, social, and personal fulfillment." Edwin Martin (1974, p. 1) speaking at the National Topical Conference on Career Education for Exceptional Children and Youth in his capacity as the deputy director of the Bureau of Education for the Handicapped, outlines the federal government's position when he set 1977 as a goal when ". . . every handicapped child who leaves school will have had career education relevant to the job market, meaningful to his career aspiration, and realistic to his fullest potential." The inclusion of career education and vocation preparation into the educational curriculum of handicapped individuals is consistent with the treatment rights discussed earlier in this paper, as every individual must have his/her own written educational program designed to allow him/her to achieve at his/her maximum potential. No matter how good career education programs are however, handicapped individuals will still face many obstacles on the road towards meaningful employment as they leave the comfortable educational realm and enter the cold and competitive realm of business. In addition to the obvious limitations imposed by their handicaps (depending of course on their severity), handicapped individuals also face the conditions of "prejudices and attitudes of employers, the inaccessibility of information networks, the absence of adequate transportation facilities, and architectural barriers" (Gittler, 1978, p. 958). A discussion of the litigation and legislation which has transpired in an attempt to provide handicapped individuals with the equal employment opportunities which are rightfully theirs will constitute the final major section of this paper.

History

Legislation affecting the employment rights of the handicapped dates back to 1917 with the passage of P.L. 64-347 (the Smith-Hughes Act) and extends in a continuous fashion to 1978 with the passage of P.L. 95-602 (the Rehabilitation Act Amendments of 1978). The major portion of this section will concentrate on P.L. 93-112 (the Rehabilitation Act of 1973) and its subsequent amendments, but a brief discussion of the history of employment legislation is appropriate.

The Smith-Hughes Act of 1917 (P.L. 64-247) established a joint federal-state program in vocational education. Designed primarily to deal with the vocational rehabilitation of veterans, it also created a Federal Board for Vocational Education. This legislation, by providing funds to states on a matching basis, was one of the first governmental attempts to deal with the problem of employing the handicapped.

P.L. 65-178 (the Soldier Rehabilitation Act) passed in 1918, expanded the authority of the Federal Board for Vocational Education by allowing it to provide vocational rehabilitation programs for disabled veterans who had been unable to obtain employment in a gainful occupation. Again, the federal government was beginning to express its concern for handicapped individuals by appropriating funds for their employment rehabilitation.

The Vocational Rehabilitation Act of 1920 (P.L. 66-236) established federal-state rehabilitation programs and required, "(1) development of a state plan to be submitted and approved by the federal agency; (2) an annual report to the Federal Board for Vocational Education; (3) establishment of the state program under the state's Vocation Education Board; and (4) prohibition of fund expenditures for buildings or equipment" (Bitter, 1978, p. 16). This act was the beginning of public rehabilitation in the United States.

The Vocational Rehabilitation Act Amendments of 1943, 1954, 1965 and 1968 extended the coverage of the original act to include persons who were mentally ill, mentally disabled, or those who were handicapped by social conditions. These acts also provided additional funding and authorization to provide vocational evaluation and work adjustment services to individuals exhibiting all handicapping conditions. Public Law 80-617 gave the President the authority to formulate rules which prohibit discrimination in employment in an executive agency on the basis of a physical handicap, and P.L. 93-516 states that blind persons licensed by a state agency are given priority to operate vending facilities on Federal property. The State and Local Fiscal Assistance Act of 1972 dictated that

government employers receiving federal revenue sharing funds are barred from discriminating on the basis of a person's handicapping condition and P.L. 94-103 (the Developmentally Disabled Assistance and Bill of Rights Act) required that each recipient of funds take affirmative action to employ and promote qualified handicapped individuals.

As important as all the previously described legislation is, probably the most important (as concerns the employment rights of the handicapped) is the Vocational Rehabilitation Act of 1973, and its subsequent amendments (P.L.'s 93-112; 93-516; and 95-602). The most famous portion of the Act is Section 504, and reads "no otherwise qualified handicapped individual shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Equally as important (though not as famous) are Sections 501 and 503 which extend the same protection to handicapped individuals employed or seeking employment with the Federal government or contractors (over $2,500) to the Federal government. Section 501 is enforced by the Civil Service Commission, Section 503 by the Department of Labor, and Section 504 by the Office for Civil Rights within the Department of Health, Education and Welfare. All of these sections have as their goal equality for the handicapped in two senses, (a) equal treatment, and (b) equal opportunity to achieve.

Discrimination

The rules and regulations for Section 504 (Fed. Reg., Wed., May 4, 1977, p. 22680) delineate the specific activities for which discrimination is prohibited. They are:

"(1) Recruitment, advertising, and the processing of applications for employment;
(2) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;
(3) Rates of pay or any other form of compensation and changes in compensation;
(4) Job assignments, job classification, organizational structures, position descriptions, line of progression, and seniority lists;
(5) Leave of absence, sick leave, or any other leave;
(6) Fringe benefits available by virtue of employment, whether or not administered by the recipient;
(7) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training;
(8) Employer sponsored activities, including social or recreational programs; and
(9) Any other term, condition or privilege of employment."

As can readily be seen, discrimination is barred on all facets of a business.

Discrimination itself can take two forms (Gittler, 1978). The first is fairly simple to detect, and consists of an employer-maintained policy which, although neutral in its face value, has the unlawful effect of screening out certain persons. An example of this type of discrimination would be the requirement of a blind person to complete a standardized written test. Although this test may be required of all applicants, the employer must make special provisions for a blind person (e.g., a braille exam). The landmark case of *Griggs v. Duke Power Company* (1971) can be used to illustrate this point. Although this case was decided under Title VII of the Civil Rights Act, it marked the first ruling by the court on this issue and must be used as a basis for other, similar cases. The Supreme Court found that an employer's condition of requiring a high school education or an average score on standardized intelligence test had a discriminatory effect. Although there was no discriminatory *intent*, the effect was enough for the court to find for the plaintiffs.

The second type of discrimination involves individual complaints, and in order to show a prima facie case of discrimination, the plaintiff must follow the guidelines set by the Supreme Court in the case of *McDonnel Douglas Corporation v. Green* (1973). The plaintiff must show (a) membership in a protected class; (b) application and qualification for the job; (c) rejection despite qualification; and (d) after rejection, the position remained open and applications were sought. If the plaintiff can establish these points, then the burden of proof falls to the employer. This is not to say that employers may not establish certain requirements for their jobs and refuse to hire persons who do not meet those

requirements. For example, in the case of *Coleman v. Darden* (1977), the court held that the Equal Employment Opportunity Commission's refusal to hire a visually impaired person as a research assistant for its attorneys was *not* discriminatory since good visual skills were necessary for adequate performance on the job. Similarly, the case of *Magruder v. Selling Areas Marketing, Inc.* (1977), the court ruled that the discharge of the plaintiff was for a good reason not related to his physical or mental handicaps. What the court is in effect saying is that employers, although they may not discriminate on the sole basis of a handicap, can establish certain minimum requirements. Some employers *do* discriminate on the basis of an individual's handicap, however, and the courts have consistently found for the individuals. Courts have found for the individuals and defined handicaps in such diverse situations as overweight teachers (*Blodgett v. Board of Trustees, Tamalpais U.H.S. District*, 1971; *Parolisi v. Board of Examiners of New York*, 1967), blind teachers (*Bevan v. New York Teachers' Retirement System*, 1973; *King-Smith v. Aaron*, 1972), and municipal employees with heart murmurs (*City of Wisconsin Rapids v. Wisconsin Department of Industry, Labor and Human Relations*, 1977). As a final example, in the case of *Bucyrus-Frie Company v. Wisconsin Department of Industry, Labor and Human Relations*, an individual was refused employment as a welder because the company's doctor stated that the individual would have a high likelihood of impairing his back because of his physical handicap. The court held that because the individual had passed the company's welding test, the employer had not adequately shown that the person could not perform the job.

A person's ability to perform the requirements of a job is, of course, critical in employment decisions. The regulations for Section 504, however, explicitly state that an employer must make "reasonable accommodations" when hiring handicapped individuals. According to Section 84.12 of the Rules and Regulations to govern the administration of Section 504, recipients of federal funds "shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program." A reasonable accommodation is that change in the structure of the position that would allow the handicapped individual to perform the essential functions of the job. This concept of "reasonable accommodation" is highly controversial, however, without it, employers would only have to afford handicapped individuals equal treatment. For example, if a mobility-handicapped person were given only equal treatment with no special accommodations, then an employment interview held in an inaccessible building would effectively eliminate that individual from consideration for the job. (S)he would have been given equal treatment (he was invited to interview) but not an equal opportunity to achieve. The intent of "reasonable accommodation" is to insure that all handicapped individuals have an equal opportunity to achieve.

Reasonable accommodation may take two forms, the first of which is access accommodation. This may involve building modifications or change in the location of a job, but by whatever means, it is simply assuring a handicapped individual that (s)he will be able to get to the location of the job. Let us examine a hypothetical example to illustrate this point. If an employer in a three-story building where only the first floor was accessible had a position open for a CPA with the office located on the third floor, a reasonable accommodation for a wheelchair-bound applicant would involve moving this office to the first floor. This minor change would in no way effect the essential functions of the job, yet it would afford the handicapped individual an equal opportunity to achieve.

More controversial and more open to judicial interpretation is the concept of reasonable accommodation by adjustments or modifications to a job. The standard in this case again is the question: Can the individual perform the *essential functions* of the job? In order to determine the answer to this question, employers must perform a detailed job analysis for all their positions. The nonessential functions must be eliminated from the job when considering handicapped individuals for the position. In the case of *Burmankin v. Costanzo* (1976), the question of whether or not a blind teacher could perform adequately was raised. Although it was demonstrated that the teacher would be unable to perform certain aspects of the job (e.g., lunchroom and playground supervision), the court found that the teacher could still teach (the essential function of the job), and ordered appropriate action. In the case of *Holland v. Boeing Company* (1976), the court found that the company had unlawfully discriminated against the plaintiff by assigning him to a job that he could not perform because of his disability. The company did have other alternatives, and should have proceeded along

those lines. In the case of *Henmann v. Board of Education of the City of New York* (1970), the plaintiff was denied a teaching certificate because she was in a wheelchair. At a later date, the board reversed its stand and granted the license, and the court dismissed the case on the grounds that the plaintiff had no standing to challenge the constitutionality of the board's policy. Finally, in the case of *Chrysler Outboard Corporation v. Wisconsin Department of Industry, Labor and Human Relations* (1976), the court found that the risk of future absenteeism and higher insurance costs do not constitute a legal basis for not hiring a handicapped person.

In the *Chrysler* case, if the company had been able to show *undue hardship* by this accommodation, then it would have had a legal basis for refusing to hire a handicapped person. The concept of *undue hardship* is quite different than what had been discussed up to this point. In educational programming decisions, the courts have consistently held that increased expenditures do *not* constitute an argument for the denial of services (e.g., *Hosier v. Evans*, 1970; *Mills v. Board of Education*, 1972). However, the law explicitly states that in employment decisions, the courts may make individual judgments concerning the amount of hardship caused by the accommodation. Factors to be considered include: "(1) The overall size of the recipient's program with respect to the number of employees, number and type of facilities, and size of budget; (2) The type of the recipient's operation, including the composition and structure of the recipient's work force; and (3) The nature and cost of the accommodation needed" (Rules and Regulations for Section 504, p. 22680). Therefore, if an organization can demonstrate that to accommodate the handicap of an applicant would cause undue hardship on the operation of its program, then that accommodation need not be made.

Bona Fide Occupational Qualifications

As has been discussed earlier, it is essential for a handicapped applicant to be able to demonstrate that (s)he would be able to perform the essential functions of a job, should (s)he wish to legally challenge a company for not hiring him/her. Most cases are decided on an individual basis, and blanket disqualifications of a certain group of individuals are rare, however, if a company is able to demonstrate that a certain group of people would be unable to perform the essential functions of a job, a company may petition for what is known as *bona fide occupational qualification* (BFOQ), and with the BFOQ be able to legally exclude all individuals of that group from consideration for employment.

> "A bona fide occupational qualification permits an employer an exception from the general prohibition against policies which discriminate a designated class and allows a policy which absolutely excludes all members of a protected class from a particular job regardless of any individual's qualifications or abilities. The exemption, is contained in the Age Discrimination in Employment Act of 1967, and Title VII (of the Civil Rights Act of 1964). (Gittler, 1978).

These exemptions must be job related, not suffer from overbreath, and, if not granted, would in some way undermine the business (*Diaz v. Pan American World Airways, Inc.* 1971). For example, if a company were to state that no individuals suffering from cerebral palsy (CP) would be allowed to work as electricians, this statement would be overbroad. However, if the company further clarified this point by stating that no *wheelchair-bound* CP individuals would be hired (because the job entailed climbing ladders), then it would be a legitimate exclusion. As is often the case though, companies' attempts to exclude certain classes are often overbroad. In the case of *Beazer v. New York City Transit Authority* (1975), the total exclusion by the New York City Transit Authority of all former heroin addicts participating in methadone maintenance programs was found to be unconstitutional, as were the medical standards that excluded epileptics from employment as police officers in the case of *Duran v. City of Tampa and Tampa Civil Service Board* (1976). Finally, in the case of *Fraser Shipyards, Inc. v. Wisconsin Department of Industry, Labor and Human Relations* (1976), Fraser's policy of not hiring diabetics as welders was found to be discriminatory. Although Fraser could demonstrate that some diabetics would be hazardous to themselves or other employees when welding, the evidence was not shown specifically for the individuals concerned, therefore, no blanket exclusion was granted.

Conclusion

The study of the employment rights of the handicapped is an area which has long been neglected by special education personnel. However, because of the goal of developing the maximum potential of each individual, and in providing him/her with the skills necessary to live as independently as possible in today's world, it is an area which deserves undivided attention. Special education teachers must be able to communicate basic employment rights to their students and the parents of their students; university personnel must be able to adequately prepare teachers in this area; and administrators must insure that curricular offerings include instruction in employment rights.

For all involved in the education of handicapped individuals, a basic knowledge of their employment rights is essential. To shy away from this area because as educators, we are not involved with out students' adult lives is simply naive. Everything we do points toward adulthood and as a result, we must become involved.

Conclusion

Special education has come under the direct analysis and supervision of the nation's lawmakers and the state and Federal courts. Not only has education for exceptional children changed drastically over the past fifty years, but the attitudes of legislators and their legislation have dramatically changed. No longer are exceptional children refused educational service. No longer are institutional placements and custodial service the least restrictive environment and alternative available to exceptional children. The public school and the community are now the place where most handicapped children will receive their education. No longer are handicapped persons barred from employment or higher education or access to public facilities. Now, governmental regulation and legislation protect handicapped persons from discriminatory employment practices, educational environments are adapted for their educational needs, and buildings are architecturally modified to provide access to all persons.

The changes that have occurred have neither been swift nor have they been without opposition. Although we have cited nearly 200 court cases and items of legislation that have had direct impact on handicapped persons, the citations are by no means exhaustive. The field of special education and the rights of the handicapped, in general, are currently undergoing a litigative explosion. The number of court cases currently receiving judicial review at the state and Federal level, though large, is mostly overshadowed by the number of local due process proceedings. Each state education association and each local school district faces the possibility of and responsibility for, educational and procedural review through the exercise of students' parents', and guardians' right to due process. This review, and a review of state and Federal courts and the legislative mandates are a strong challenge to special educators. In the next few years the system will test its own limits with diverse cases and hearings on diverse topics leaving, in the end, handicapped persons, the government, and the schools mutually responsive and responsible to each other.

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Footnotes

[1]Reprints may be obtained from either author at Department of Learning and Development, Northern Illinois University, DeKalb, Illinois 60115.

[2]The order of authorship was determined by a coin toss.

[3]All starred (*) court cases were state or local decisions and may not have national implications.

[4]Least restrictive environment and least restrictive alternative for the purposes of this paper are not identical. Although there has been a good deal of interchangeable use of the terms (e.g., Abeson, 1977; Schmidt & Williams, 1978) they are in fact, different. Least restrictive environment, as it implies, is an environmental or placement concern. The question: Where is it that the child will receive his/her education? Least restrictive alternative is a programmatic concern. The question here is: What type of technology can best treat, though least restrict the individual? This paper is concerned with both issues, therefore, we will strictly adhere to the definitions outlined above.

[5]The Brown v. Board of Education (1954) decision on racial desegregation may logically be assumed to be the basis for the LRE movement.

Appendix A

HOW TO READ LAW REFERENCES AND HOW TO FIND THEM

1. *Example.* Gurmankin v. Constanzo 411 F. Supp. 982 (1976) affirmed 556 F. 2d 184.
2. F. Supp. = Federal Supplement
3. 411 = Vol. 411
4. 982 = p. 982 of Vol. 411
5. affirmed means that the case was heard in a higher court and this too should be read.
6. F 2d = Federal Reporter 2nd Series (look for the 2d on the binding)
7. 556 = Vol. 556
8. 184 = Page 184 of Vol. 556
9. Law is on the 2nd floor of the library.